

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 17,459

420

MIAMI NEWSPAPER PRINTING PRESSMEN'S UNION,
LOCAL 46, *Appellant*,

v.

FRANK W. McCULLOCH, ET AL,
INDIVIDUALLY AND AS CHAIRMAN AND AS
MEMBERS OF AND CONSTITUTING THE
NATIONAL LABOR RELATIONS BOARD, *Appellees*.

ON APPEAL FROM AN
ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. Whether a United States District Court has original jurisdiction to restrain a National Labor Relations Board decision directing an election under a verified complaint asserting a violation of express statutory and constitutional rights.
2. Whether the National Labor Relations Board's determination was a valid exercise of its discretionary powers.
3. Whether the Board's action in this case satisfied the requirements of due process secured to Appellant by the Fifth Amendment to the United States Constitution.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an Order (J.A.¹ 22) of the United State District Court for the District of Columbia (Walsh, J.) denying Appellant's motion for a preliminary injunction and granting Appellees' motion to dismiss their complaint.

In Appellant's complaint (J.A. 2) which was predicated upon 28 U.S.C. 1337 (App. 1A) Appellant sought injunctive relief against a certain election directed by the Board purportedly pursuant to Section 9 of the National Labor Relations Act as amended (61 Stat. 136; 29 U.S.C. 151,

¹ Designation for Joint Appendix is "J.A." Designation for the Appendix to this Brief is "App."

et seq.) hereinafter referred to as the Act.² The jurisdiction of this Court is invoked under 28 U.S.C.A. 1292(1) and 1294.

STATEMENT OF THE CASE

The undisputed facts as set forth in the complaint, the affidavit in support of the complaint, and the exhibits thereto may be summarized as follows:

1. The Board Proceedings

Appellant is a local labor organization maintaining its principal situs in Miami, Florida, and is composed of some 350 newspaper printing pressmen employed by the newspaper publishing industry in and around Miami, Florida (J.A. 3, 14).

On August 1, 1961, Appellant's members employed by the Miami Herald Publishing Company, publisher of a daily newspaper known as the "Miami Herald" in the City of Miami, Florida, began a lawful economic strike against such newspaper in connection with a dispute respecting the terms of a renewal collective bargaining contract (J.A. 2, 3, 12, 14). While such strike was in progress and on or about May 29, 1962, Appellant filed a petition for certification of representatives with the Regional Director of the National Labor Relations Board for its Twelfth Region, asserting that a substantial number of the employees of the Miami Herald, including the strikers, desired to be represented for purposes of collective bargaining by Appellant pursuant to Section 9 of the National Labor Relations Act. Such petition was docketed as Case No. 12-RC-1471 by the Regional Director for the Board's Twelfth Region (J.A. 1). Prior to the time Appellant filed such representation petition, the Board had delegated to the Regional Director for the Twelfth Region, pursuant to Section 3(b) of the National Labor Relations Act, its powers under Section 9

² Relevant portions of the Act are set forth in the Appendix, infra pp. 1A to 3A.

of such Act, "to determine the unit appropriate for purposes of collective bargaining; to investigate and provide for hearings and determine whether a question of representation exists, and to direct an election or take a secret ballot vote under subsection (c) or (e) of 29 U.S.C.A. Section 155 and certify the results thereof" (J.A. 1, 11-12; App. 2A).

Following a hearing had before a Hearing Officer designated by the Regional Director in which Appellant and the Miami Herald Publishing Company appeared and participated, the Regional Director directed an election on June 29, 1962, ordering that such election be held to determine the question of representation within thirty days from the date of such decision and direction of election or on or before July 29, 1962.

At this point the Miami Herald filed with the Board a request for a review of the decision of its Regional Director which the Board telegraphically denied on July 20, 1962, stating that such request for review raised "no substantial issue of fact or law warranting a review." Thereafter the Regional Director scheduled the election for July 25, 1962 (J.A. 2, 12).

On July 24, 1962, the Miami Herald brought an action in the United States District Court for the Southern District of Florida, Tampa Division, seeking to enjoin the Regional Director from conducting the scheduled election, alleging *inter alia* that the Board's denial of its request for review of the Regional Director's decision and direction of election was invalid in that it was ruled upon by one member of the Board instead of by at least three members as allegedly required by Section 3(b) of the Act. The Court declined to enjoin the election but ordered the ballots cast therein impounded pending a final adjudication (J.A. 3, 12, 25-26).

On August 6, 1962, the Florida District Court ruled that it had jurisdiction of the Miami Herald suit and scheduled

such suit for a hearing on the merits. Before the Florida District Court held the scheduled hearing, the Board issued a telegraphic order dated August 22, 1962 (J.A. 23-24) in which it purported to vacate its prior order of July 20, 1962 denying the Herald's request for review; granted the Herald's request for review and set aside the election conducted on July 25, 1962. This order prompted the Florida District Court to dismiss the Herald's suit as moot (J.A. 25-29).

Two days following its telegraphic order granting the Herald's request for review and purportedly vacating the election held on July 25, 1962, and specifically on August 24, 1962, the Board again, by telegram, requested briefs from the Herald and the Appellant Union on the questions involved in the Board's review of the Regional Director's decision and direction of election. Both the Herald and the Appellant filed briefs and on November 8, 1962, the Board issued a decision on review and remand affirming the Regional Director's decision and direction of election but, however, directing the Regional Director to conduct a so-called "rerun" election, pursuant to his decision and direction of election of June 29, 1962 (J.A. 19-23). The Board in its decision on review and remand reserved the question of the voting eligibility under Section 9(c)(3) of the Act of replaced economic strikers who had been on strike for longer than twelve months, stating that it would determine that question "should the votes of the economic strikers be sufficient in number to affect the results of the election." In this decision the Board further directed the Regional Director to challenge the ballots of all such strikers (J.A. 22).

In obedience to the Board's decision on review and remand, the Regional Director scheduled the rerun election for November 5, 1962. This suit by Appellant followed.

2. The Proceedings Below

In its verified complaint, supporting affidavit and exhibits in the District Court, Appellant alleged the history of the foregoing proceedings and sought a declaratory judgment that the July 25, 1962 election was the election which the Board should certify the results of rather than the December 5 "rerun" election; sought to restrain the Appellees from destroying the ballots of the July 25 election, and sought a temporary restraining order, a preliminary and permanent injunction against the holding of the rerun election scheduled for December 5, 1962; a mandatory injunction directing the Board to perform its statutory duty by counting the ballots cast in the July 25 election and certifying the results of such count and such other, further and incidental relief as the Court might deem just and proper. The basis for the relief sought by Appellant under its complaint is as follows:

(1) The refusal of the Board to certify the results of a valid election had on July 25, 1962 was contrary to an express statutory command set forth in Section 9(c)(1) of the Act which provides, "If the Board finds upon the record . . . that such a question of representation exists, it shall direct an election by secret ballot and SHALL CERTIFY THE RESULTS THEREOF. And in connection with the July 25, 1962 election, Appellant pointed out that no claim by any party had been made with respect to improper conduct which would have affected the results of such election and, indeed, no irregularity of any kind has ever been attributed to the election itself. And finally the Board had affirmed after full consideration the validity of the decision and direction of election under color of which such election was had.

(2) The consequences of the Board's failure to "certify the results" of the July 25 election was to disfranchise Appellant's members who had been on strike against the Miami Herald since such strikers are entitled under the

1959 amendment to the National Labor Relations Act to vote only "in any election conducted within twelve months after the commencement of the strike." Since the rerun election which the Board ordered would necessarily take place subsequent to August 1, 1962 and therefore more than one year after the commencement of the strike, the disfranchisement of Appellant's striking members was both apparent and complete.

(3) The *sua sponte* telegraphic order of the Board of August 22, 1962 was arbitrary, capricious and unlawful in that it granted the Herald's request for review and the ultimate relief sought by the Herald, to-wit, the vacation of the election had July 25, 1962 without notice, hearing, or opportunity for hearing, and that the decision on review and remand which provided for a "rerun election" but which did so after affirming the Regional Director's decision and direction of election was similarly arbitrary and capricious. For if the Regional Director's decision and direction of election was valid as the Board held upon full consideration, then there was no basis in fact or law for a rerun election in the absence of allegations of illegality or impropriety with respect to the actual conduct of the July 25, 1962 election. Thus, the ultimate affirmance by the Board in its decision on review and remand of the Regional Director's decision and direction of election emphasizes the arbitrary character of the defendant's determination to set aside the election had under such decision and direction of election and exposes the lack of basis for a second election. And the second election is the more indefensible since Appellant's striking members were as plainly ineligible to vote therein as they were eligible to vote in the July 25, 1962 election.

All of the foregoing contentions were advanced to Judge Walsh in the Court below on Thursday, November 29, Friday, November 30, and the following Monday, December 3, 1962. On the latter date, the District Court, after having

been assured by the Board that it would preserve the ballots cast in the July 25, 1962 election, requested the parties to file findings of fact and conclusions of law by 4:00 p.m. December 4, 1962. Judge Walsh accepted the findings of fact and conclusions of law submitted by the Board and dismissed Appellant's suit for lack of jurisdiction and prematurity. (J.A. 38-41).

3. Proceedings In This Court

Shortly after 9:00 a.m. Wednesday, December 5, 1962, Appellant filed its notice of appeal with the Court below requesting that the record be prepared for an emergency hearing before this Court. As soon as such record was prepared and transmitted to this Court, Appellant filed with the Court its motion to stay the election scheduled for 3:00 p.m. on such date, to-wit, December 5, 1962. Thereafter the Court entered its order of December 5, 1962 denying the motion to stay the election but ordering the Board to impound the ballots of such election until further order of this Court. In such order this Court directed the parties to file memoranda in support of their respective positions, whereupon this Court entered an order on December 21, 1962, continuing in effect its order of December 5, 1962, and further directing the Appellee Board to "impound the ballots of the election of July 25, 1962 until final disposition of this suit" stating that "this appeal presents very close and serious questions."

STATEMENT OF POINTS

1. The District Court erred in holding that it lacked jurisdiction of the subject matter of this cause under 28 U.S.C. Section 1337; 28 U.S.C. Section 2201, and 28 U.S.C. Section 1361, (Public Law 87-748, 76 Stat. 744), since the complaint alleged and the motion to dismiss admitted the facts therein which spell out in factual terms violations by the Board of a clear statutory command imposed by the

Act; a denial of Appellant's right to due process under the Fifth Amendment to the United States Constitution and arbitrary and capricious administrative conduct of the Appellee Board in setting aside the election of July 25, 1962 and ordering a rerun election for December 5, 1962 rather than counting the ballots of the valid July 25 election as required by law.

2. The District Court erred in holding that Appellant's action was premature since the complaint alleged a crystal clear danger that without the relief prayed for Appellant's right to an adjudication would be frustrated, mooted and rendered vain, idle and illusory, either by the destruction of the July 25, 1962 election ballots or by the wrongful certification of the results had in an invalid "rerun" election.
3. The District Court erred in denying Appellant the injunctive relief it sought.
4. The District Court erred in dismissing the complaint.

SUMMARY OF ARGUMENT

1. The District Court had jurisdiction to review and restrain the Board's exercise of authority in plain violation of a specific statutory command. *Leedom v. Kyne*, 358 U.S. 184. Other holdings make it plain that the exercise of Board power in an arbitrary and capricious manner contrary to the intent of Congress as spelled out in the Act is subject to federal judicial restraint. *Hotel Employees Union v. Leedom*, 358 U.S. 99; *Office Employees International Union v. N.L.R.B.*, 353 U.S. 313. Similarly, the jurisdiction of the district courts may invoke where a complaint alleges a deprivation of the constitutional right in terms that are not "transparently frivolous." *Fay v. Douds*, 172 F.2d 720.

Recently the Second Circuit Court of Appeals has held that the foregoing categories of jurisdiction are not comprehensive and that the book has not been closed for all

time to an extent which would immunize all representation orders of the Board from District Court scrutiny and that the courts must decide via the empirical process of decision where, in a particular type of case, congressional intent manifest from the statute indicates the propriety of judicial intervention as against agency action which is contrary in the context of a particular situation to the policies and purposes of the Act. See *Empressa, et al v. McLeod*, 300 F.2d 222 at 228.*

The complaint below plainly alleged a refusal by the Board to perform the statutory function of "certifying the results" of an election which the Board itself has held was conducted under a valid decision and direction of election by its Regional Director, and no charges asserting improper conduct affecting the results of the election were filed. The complaint alleged and the Board admits that it has refused to certify the results of the July 25, 1962 election, notwithstanding the language of the statute which states in mandatory terms that the Board "shall certify the results" of elections held by the Board in the discharge of its responsibilities under Section 9 of the Act. By failing to perform this mandatory statutory duty, the Board "obliterated" a "right which Congress" had given in 1959 to economic strikers not entitled to reinstatement to cast their ballots and have them counted in any election held within one year after the commencement of the strike. See *Leedom v. Kyne*, supra.

It cannot be argued with validity that the statutory duty to "certify the results" of elections is permissive rather than mandatory.

* *McLeod v. Empressa*, *supra*; *McCulloch v. Sociedad*, 201 F. Supp. 82; *N.M.U. v. Empressa*, 300 F.2d 222; *Ingres Steamship Co., Ltd. v. Intl. Maritime Workers Union*, 10 N.Y.2d 218 are currently pending before the United States Supreme Court upon certiorari previously granted. The Supreme Court rendered judgment on February 18, 1963, 31 Law Week 4212-4217.

While Section 9(c) of the repealed Wagner Act, 49 Stat. 351, provided in respect of elections that the Board "may" take a secret ballot of employees or utilize any other suitable method to ascertain such representatives, Congress amended the Act in 1947 and changed the word "may" to "shall" throughout Section 9(c). It is submitted, accordingly, that Congress in substituting the word "shall" for "may" intended the provisions of Section 9(c) to be thenceforth mandatory. Admittedly, if charges were pending before the Board attacking the legality of the July 25, 1962 election, the Board would be in position to argue with some force that its duty to certify in such circumstances was in the area of administrative discretion committed to it by Congress. But this is not the case and its failure to certify is a transparent effort to avoid performing a mandatory statutory duty.

2. The action of the Board in telegraphically vacating the election had July 25, 1962 was arbitrary, capricious and operated to impair the due process protection afforded Appellant by the Fifth Amendment to the United States Constitution. Moreover, this administrative abuse was in violation of the Board's own rules and regulations as well as Section 3(b) of the National Labor Relations Act under which the Board had previously delegated its powers under Section 9 to the Regional Director. This statute, enacted to permit the Board through the full use of its Regional Directors to cope with a tremendous case load, was intended to permit the Regional Directors to function in the stead of the Board. While Section 3 provides that the Board "may review any action of the Regional Director" it stipulates that such a review *shall not*, unless ordered by the Board, operate as a stay of any action by the Regional Director. Thus, upon delegation by the Board, the Regional Director was acting with all of the power of the Board itself when he ordered that an election be held on July 25. No application for a stay of this action was made to the Board by the Miami Herald or anybody else.

Nor was any stay specifically ordered by the Board. Nevertheless, after the election the Board granted the request for review sought by the Herald and at the same time set aside the election, thereby awarding the ultimate relief sought before the review was had. Then after review and in its decision upon review and remand, the Board concluded that the Regional Director had acted properly in every respect and affirmed his decision and direction of election. Despite this and for no stated reason, the Board simply continued its order setting aside the July 25 election because "the ballots had not yet been counted." This is administrative bungling of the worst type. The Board simply said, "We have set aside the election for no reason and we will continue to direct that it be set aside because we have previously set it aside."

If Appellant were in a position to view the Board's maneuvering in this case with detachment, then it might strike a humorous chord. But the consequences to Appellant's striking members are both serious and irreparable. If the Board's rerun election stands, the Appellant's members are forever disfranchised.

As the affidavit filed in this Court discloses (See App. 4A and J.A. 35, Appellant's members were in Miami eligible to vote and did vote in the July 25 election. In so doing they were exercising a statutory right conferred upon them as economic strikers to cast their ballots and to have their ballots counted and the results certified. But after the expiration of the one year period their ballots could not as a matter of law be counted. And as the affidavit filed in this Court discloses, large numbers of Appellant's striking members were compelled for economic reasons to seek employment outside of the State of Florida and were not available to vote in the election had on December 5, 1962. Thus, the failure of the Board to certify the results of the election had July 25 also obliterated the statutory right of Appellant's members as economic strikers to vote and have their ballots counted.

3. The telegraphic Board order of August 22, 1962 setting aside the election was granted without an opportunity to Appellant to be heard and *before review*. In other words, the ultimate relief was granted prior to the hearing.

Due process concepts have been held not to require a hearing at any particular stage in respect of disputed issues in a representation proceeding. See *Inland Empire Dist. Council v. Mills*, 352 U.S. 697, construing pre-Taft-Hartley Section 9(c), "the conclusive act of decision in the investigation is that certification and due process is satisfied" so long as the requisite hearing is held before the final order becomes effective. *Morgan v. U.S.*, 298 U.S. 468, 481. In this case, however, the telegraphic order vacating the election is affirmed in the decision on review and remand *simply because* the vacating order had been previously issued and for no other stated reason. While the demands of due process are not "technical" they are requirements of substance. And substantive rights of Appellant conferred by the Congress have been effectively obliterated by means of an order vacating an election issued prior to reviewing the Regional Director's decision. And then *after affirming the Regional Director's decision*, adherence by the Board to the order vacating the election is simply incomprehensible.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO DIRECT CONFORMANCE BY THE BOARD TO A PLAIN STATUTORY COMMAND.

A. Introduction

The jurisdictional question in this case is controlled by *Leedom v. Kyne*, supra. Here the Board, contrary to a specific statutory command, has refused to certify the results of a valid election. Jurisdiction is further supported by the consequences of this refusal, i.e. the obliteration of the right of the economic strikers affected to vote at all

and by the arbitrary fashion in which the Board reached its contested determination. The instant factual situation is well within the scope of the Supreme Court's holdings in *Kyne, Hotel Employees v. Leedom*, 358 U.S. 99, where the Court held that the conclusion of the Board not to exercise jurisdiction over the entire industry as a class was arbitrary, erroneous, and beyond the discretionary powers of the Board, and *Office Employees International Union v. N.L.R.B.*, 353 U.S. 13, where the Court held that the Board did not have the power to decline to assert jurisdiction over labor unions as a class since such refusal was arbitrary and contrary to the intent of Congress.

The rationale of the latter holdings is refined and extended in *Empressa, et al v. McLeod* (C.A. 2), 300 F.2d 222. In *Empressa*, Judge Friendly, speaking for the Second Circuit, pointed out that it was settled law that district courts had jurisdiction to enjoin the Board in representation matters where plaintiffs made an assertion "not transparently frivolous" that failure to enjoin would deny rights guaranteed by the Constitution, and where the Board had acted in plain contravention of a specific mandate of the Act. Continuing, the Court had this to say:

However, the failure of the complaint here to come within either of the categories of actions to enjoin representation orders that have heretofore been sustained is not fatal; the book has not been closed for all time. *Leedom v. Kyne*, supra, must be taken to have determined that whatever may be the case with respect to orders of the National Mediation Board as to bargaining units, representation orders of the N.L.R.B. have not been vested with complete immunity from injunction, either by inferences from the National Labor Relations Act or on the principle of *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41. Once that step has been taken, the courts must make up their minds, as best they can, whether in a particular type of case Congress would or would not have wished them to intervene against 'agency action taken in excess of delegated powers' . . . We cannot believe Congress

would have wished to limit the role of the courts in that situation to cases where the Board had violated a clear statutory command as against a command not so clear.

And see *The Greyhound Corp. v. Boire*, 205 Fed Supp. 686 affirmed *per curiam*, 309 F.2d 397 (C.A. 5), which upheld the jurisdiction of federal district courts to restrain Board action "if it appears that the Board exceeded its delegated powers, either by acting contrary to a mandatory prohibition of the Act or by acting clearly contrary to the overall spirit of the Act and the manifested intention of Congress." In such circumstances "this court cannot fail to exercise its equity powers to prevent a wrong" 205 Fed. Supp. at 690. See *Cox v. McCulloch* (CADC), decided January 24th, 1963, and unofficially reported at 52 LRRM 2261.

We shall show that the instant suit falls within the principles of the foregoing holdings and that the District Court erred in dismissing for lack of jurisdiction.

B. *The Board's Refusal To Certify The Results Of The July 25, 1962, Election Violates Section 9(c)(1).*

Section 9(c)(1) of the Act provides in relevant part that:

"If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

To summarize the Board's conduct as disclosed by the complaint is to realize that Appellant's contention that the Board's refusal to proceed to perform its duty under the Act to certify the results of the July 25 election is an insistence of substance which cannot be dismissed upon the theory that Congress committed to the Board's discretion whether or not it should certify the results of elections had under a valid decision and direction of election. For Congress stripped the Board of certain discretionary powers in this area when it enacted the Labor Management Rela-

tions Act 1947. The former section 9(c) contained in the repealed Wagner Act, 49 Stat. 351, read as follows:

“In such investigation the Board shall provide for an appropriate hearing upon due notice . . . and may take a secret ballot of employees or utilize any other suitable method to ascertain such representatives.”

The discretionary character of this provision was discussed in *Inland Empire, et al v. Millis*, 352 U.S. 697, 705. Subsequent to the *Millis* decision the foregoing provision was replaced by the present 9(c) set forth above which substitutes the phrase “shall” for “may” throughout. By replacing a permissive phrase with a mandatory one Congress clearly demonstrated its intention to strip the Board of discretion.

Also persuasive is the fact that the language of the present Section 9(c) is materially different from Section 10(a), 61 Stat. 146, 29 U.S.C. 160, which provides for the correction of unfair labor practices. Section 10(a) provides in part:

“The Board is empowered as hereinafter provided to prevent any person from engaging in unfair labor practices . . .”

Where Congress intended discretionary authority it so stated by using the specific language “empower.” When it intended to impose an unqualified obligation, it used the word “shall.” Thus we say that there rested upon the Board, following the July 25 election, the mandatory duty to certify the results thereof. The language of the section of the Act under discussion is clear and specifically the implications of the use of the word “shall” are clear and subject to no ambiguity. It must therefore be assumed that the plain language of the statute represents the intent of Congress and that when the Board fails to conform to the language of the statute it is undertaking the “exercise of power that has been specifically withheld.” *Leedom v. Kyne*, supra. The Board thereby deprives the affected em-

ployees of a right assured to them by Congress. "Surely in these circumstances a federal district court has jurisdiction of an original suit to prevent deprivation of a right so given." *Leedom v. Kyne*, *supra*.

C. The Arbitrary Refusal Of The Board To Certify The Results Of The July 25, 1962 Election Results In The Obliteration Of A Right Granted By Congress To Appellant's Members Engaged In An Economic Strike Against The Miami Herald To Vote In A Representation Election And To Have Such Votes Counted.

Section 9(c)(3) of the Act provides, insofar as relevant, that:

"Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike."

Section 9(c)(3) as aforesaid represents an amendment accomplished by Section 702 of the Labor Management Reporting and Disclosure Act of 1959. The law previously read:

"Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

Congress was concerned with the disfranchisement of economic strikers and sought to assure such individuals an opportunity to vote in any representation election which took place within twelve months after the commencement of the economic strike. This legislation repealed the prior statutory prohibition against employees on strike who were not entitled to reinstatement voting in any representation election. 9(c) (3) was one of the most sought-after amendments to the Taft-Hartley Act which Congress passed after full debate in 1959. And its enactment was based on experiences under the 1947 prohibition against economic strikers

voting which had demonstrated the ease with which a Union could be destroyed by reason of the prohibition against strikers voting. Before the amendment an employer could provoke a strike, recruit a few replacements, call for an election and with the replacements only voting, the outcome of the election was assured. (See Vol. 2 Legislative History of the Labor Management Reporting and Disclosure Act, page 1760, 1762 where Congressman Dent describes in detail exactly such a use of Section 9(c) (3) of the Taft-Hartley Act by the O'Sullivan Rubber Corp. in Winchester, Virginia in 1956).

The purpose of the new Section 9(c) (3) adopted in 1959 was explained by Senator Kennedy as follows:

"Our purpose is to permit economic strikers to vote while there is a lawful strike in progress, a strike for a reasonable and proper purpose and to permit the Board to adopt a rule of reason in making a judgment as to when it would be wise to terminate the right." Congressional Record, Senate, April 23, 1959, page 1318.

Commenting on the precise language which represented the amendment as finally adopted by the Congress, Senator Kennedy again, as one of the Senate conferees, referred to it in explaining the final text of the Act to the Senate in these terms:

"We guarantee them (economic strikers) the right to vote for at least a year after the strike begins." Congressional Record, Senate, September 3, 1959, page 16414.

At the same time, the language of the enactment clearly limited the right to vote awarded economic strikers to the twelve month eligibility period. For it is clear that Congress did not intend to permit economic strikers to vote in an election conducted after the twelve month period had expired nor did it authorize the National Labor Relations Board to permit economic strikers to vote in an election

conducted after the twelve month period had expired. This limitation is made clear by the following legislative history:

"Section 702 relaxes the present ban on voting by economic strikers in representation elections. Two limitations are imposed. First, economic strikers are not to be eligible to vote after twelve months after the commencement of the strike. In other words, a maximum length of time is established. (Congressman Griffin, 105 Daily Congressional Record, A 7915, September 4, 1959). * * * *

"Section 702 only restores the law with respect to vote of economic strikers as to what it was prior to the enactment of the National Labor Relations Act of 1947 as amended with the qualification, however, that *after the expiration of twelve months after the commencement of the strike economic strikers not eligible for reinstatement would lose such right to vote . . .*" (Congressman Barden, 105 Daily Congressional Record, A 8061, September 4, 1959).

The Senate conferees explained the meaning of the new Section 9(c) (3) as follows:

"The proposal follows the Goldwater bill and the administration's recommendations except that economic strikers would not be permitted to vote after one year." 105 Daily Congressional Record, 5906, August 28, 1959.

From the language of Section 9(c) (3) and its legislative history, two things emerge with clarity. First, Congress intended economic strikers to have a right to vote for the twelve months period following the commencement of the economic strike and second, Congress did not intend economic strikers to have the right to vote in representation elections after the expiration of the twelve months period. As the result of the *refusal* of the Board to *certify the results* of the July 25 election and its determination to hold a "rerun" election after the expiration of the twelve months period, the Board has effectively deprived the striking members of Appellant their statutory right to vote. It is

respectfully submitted that this action is a plain transgression of Appellant's rights under Section 9(c) (3) of the Act.

And where the Board has acted "clearly contrary to the overall spirit of the Act and the manifested intention of Congress" . . . then a United States District Court "cannot fail to exercise its equity powers to prevent a wrong." *Greyhound Corp. vs. Boire*, *supra*, 205 Fed. Supp. at 690.

II. THE BOARD'S DECISION ON REVIEW AND REMAND IN WHICH IT DIRECTED A RERUN ELECTION IS UNREASONABLE, ARBITRARY, CAPRICIOUS AND DESIGNED TO DISFRANCHISE APPELLANT'S STRIKING MEMBERS. THIS ACTION IS NOT PREMATURE.

Despite a finding in which it expressly affirmed and ratified the decision and direction of election of its Regional Director for the Twelfth Region pursuant to lawfully delegated authority, the Board incredibly directed a new or rerun election for no stated reason other than the fact that it had previously vacated the July 25 election—also for no stated reason.

At first blush, as well as finally, this determination of the Board is unbelievable. But considerations of candor have persuaded us to pursue the invidious task of examining the Board's motivation for so holding. Upon a decision by the Florida District Court that it had jurisdiction of the Herald Publishing Company's complaint which put in issue on its merits the validity of an internal administrative practice of the Board under which it assigned all requests for review of Regional Directors' decisions and directions of elections to a single member of the Board each month—sometimes called the "member of the month policy"—the Board promptly issued an order prior to the day set by the Florida District Court for the hearing on the merits of the Herald's action against the Board in which it not only granted the Herald's request for review but awarded the

ultimate relief sought by the Herald, to-wit, the vacation of the election. By so doing, the Board successfully mooted the Herald Company's action thereby avoiding a chance of judicial disapproval of an internal practice. In the meantime, the Board was aware that numerous strikers had, subsequent to July 25, been forced for economic reasons to take temporary employment in other cities scattered throughout the country and who were unable to return for a rerun election due to the expense involved and the jeopardy to their temporary employment. In fact, in the rerun election held December 5, 1962, only 67 economic strikers voted challenged ballots whereas in the election held July 25 over 100 economic strikers voted. Advance awareness of the probable attrition of strikers in the period between July and December put the Board in the position of never being called upon to decide under its decision on remand and review the eligibility of economic strikers to vote in the rerun election, since the absence of so many for the reasons stated in the affidavit of Henry L. Gibson filed in this Court would probably leave a situation where the challenged ballots of the economic strikers would not be sufficient in number to affect the results of that election. Thus by the device of a rerun election, wholly unknown to Board procedures heretofore, the Board would accomplish two things. First, it would not be required to decide the eligibility of the economic strikers to vote in the rerun election held more than one year following the strike since those available to vote would cast ballots insufficient in number to affect the results of the election. Second, it would free the Board from litigating with the Miami Herald Publishing Company the validity of its administrative practice of having a single member of the Board, rather than a panel of Board members, to decide appeals from Regional Directors' decisions.

In sum, the Board was confronted with the choice of litigating its member-of-the-month administrative practice

or throwing Appellant's striking members to the wolves. It chose the latter route.

We submit that the action of the Board as aforesaid was without any legal basis. A so-called "rerun election" in the face of a valid decision and direction of election and the absence of even a suggestion that some defect or procedural flaw characterized the conduct of the election had July 25 persuades that the rerun election ordered by the Board represented an abusive and arbitrary determination and we submit a determination that the Board would not have made except for the pressure of the litigation instituted by the Miami Herald Publishing Company in the Florida District Court.

Moreover, this factual situation makes crystal clear that the instant proceeding is anything but premature. For if the Board had been left free to certify the results of the December 5 election, the consequence to Appellant would have been the termination of its economic strike against the Miami Herald. This event would have rendered Appellant's suit moot before it could possibly have been heard in the regular course of events. As this Court originally said in *Cox v. McCulloch* (CADC), —— F.2d ——, 52 LRRM 2261, 2262.

"Since an unsuccessful union in a certification proceeding before the Board has no adequate remedy by review, and it appearing that certification * * * would be in direct contravention of the Act, the jurisdiction of the District Court in a *Leedom v. Kyne* type of action should be determined."

Up until this case, a "rerun" election was absolutely unheard of. No provision for such an election is made in the Board's rules and regulations in the context of this situation. And no prior "rerun" election had ever been ordered by the Board in a situation remotely analogous to that presented by the instant suit.

We suggest that the rerun election device was contrived by the Board for this day and this train only in an effort to

free itself from the embarrassment of litigating the validity of an internal administrative practice with the Miami Herald. To brand this course of conduct by the Board arbitrary and capricious is something more than a mere legal characterization. In a profound sense, the Board has departed from a mandatory statutory duty; ignored the statutory right of economic strikers to vote in representation elections; departed from procedural regularity and due process concepts, all in deference to the Florida litigation. As a consequence, Appellant's striking members have been unwillingly cast in the role of sacrificial lambs to a private, not a public, purpose of the Board. The compelling circumstances of this case persuade that no doctrine of administrative immunity from judicial review should be permitted to bar Appellant from the relief which it seeks and to which it is justly entitled.

III. THE ACTION OF THE BOARD IN SETTING ASIDE THE JULY 25 ELECTION WITHOUT NOTICE OR AN OPPORTUNITY TO BE HEARD AND WITHOUT STATING ANY REASON THEREFOR WAS AND IS A VIOLATION OF APPELLANT'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Under the circumstances described above it is respectfully submitted that the action of the Board in setting aside the July 25th election without notice or an opportunity to be heard cannot stand the fundamental test of due process. As stated by Lord Coke in his struggles with the King in Seventeenth Century England:

"... the damnable and damned proceedings of the Judge of Hell ... first he punisheth, and then he hear eth . . . but good Judges and Justices abhor these courses."

Certain basic principles of fair play have remained immutable in our law since that time. Among these is the right to notice and to be heard before your rights are wiped out—whether the action be in the name of administrative discretion, the safety of the public, or any other verbal cloak. EX PARTE MILLIGAN, 4 Wall. 2.

Equally fundamental is the basic requirement of due process and of law that an Administrative Agency, when finally passing upon the rights of parties, must set forth the reason for its action. Not only is this required by a "decent respect for the opinions of mankind" but it also has the wholesome effect of guaranteeing that cases shall be decided according to the evidence and the law, and not arbitrarily or for some extra-legal reason. As stated by the United States Supreme Court in *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177:

"From the record of the present case we cannot really tell why the Board has ordered reinstatement of the strikers who obtained subsequent employment . . . The Administrative process will best be vindicated by clarity of its exercise. Since Congress has defended the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (§ 10(e) (f)), it will avoid needless litigation and make more effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order."

Similarly in the more recent case of *Secretary of Agriculture v. United States*, 347 U.S. 645, the Supreme Court struck down an order of the Interstate Commerce Commission because "the Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision." The importance of giving a reason for administrative agency rulings is further emphasized by the rule that such rulings must be sustained on judicial review *only* upon the grounds relied upon by the agency, unlike the rule applicable to the affirm-

ance of a lower court's decision where the result is correct but the reason wrong. See *S.E.C. vs. Chenery Corp.*, 318 U.S. 80, holding that for this reason the grounds for agency action must be "clearly disclosed and adequately sustained." See also *N.L.R.B. v. Capital Transit Co.* (CADC, 1955), 221 F.2d 864.

Finally, it is submitted that the Board's action here involved clearly is in stark violation of its own formally promulgated rules and regulations. Thus in Section 101.21(d) of the Board's Statements of Procedure, it is expressly stated that:

"The Regional Director's action is not stayed by the filing of such a request (for review) or the granting of review unless otherwise ordered by the Board."

And in Section 101.21(a):

"In the event the Regional Director decides the issues in a case, his decision is final subject to the review procedure set forth in the Board's Rules and Regulations."

Here, however, the action of the Regional Director in conducting the election was not final subject to the review procedure of the Board, but was arbitrarily set aside by the Board without notice, an opportunity to be heard, or reason stated. The question therefore arises as to whether an agency's disregard of its own rules of procedure is an independent ground for invalidating its action. The answer has been repeatedly given by the Supreme Court—it is (*Vitarelli v. Seaton*, 359 U.S. 535; *Service v. Dulles*, 354 U.S. 363; *Accardi v. Shaughnessy*, 347 U.S. 260). As stated by Mr. Justice Frankfurter in his partially concurring and partially dissenting opinion in *Vitarelli*:

"An executive agency must be rigorously held to the standards by which it professes its actions to be judged. . . . This judicial rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword . . ."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order of the District Court should be reversed and that the case should be remanded to that Court with instructions to issue the relief prayed for in the complaint.

Respectfully submitted,

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APPENDIX TO BRIEF

Statutes:

28 U.S.C. §1337

“The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.”

28 U.S.C. §1361

“The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”
(October 5th, 1962, 76 Stat. 744)

28 U.S.C. §2201

“In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”

**§3(b), Labor-Management Relations Act, 1947, 29 U.S.C.
§153(b)**

*** * * The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot

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under sub-section (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a Regional Director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the Regional Director. * * * *

**§9(c)(1), Labor-Management Relations Act, 1947, 29 U.S.C.
§159(c)(1)**

"Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

**§9(c)(3), Labor-Management Relations Act, 1947, 29
U.S.C. §159(c)(3)**

"* * * Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike."

**§10(a), Labor-Management Relations Act, 1947, 29 U.S.C.
§160(a)**

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.
* * * *

§9(c), Wagner Act, 49 Stat. 453

"Whenever a question affecting commerce arises concerning the representation of the parties, the Board must investigate such controversy and certify to the parties in writing the name or names of representatives that have been designated or selected. In any such investigation the Board shall provide for an appropriate hearing upon due notice either in conjunction with a proceeding under §10 or otherwise, and may take a secret ballot of employees or utilize any other suitable method to ascertain such representatives."

**Affidavit Of Henry L. Gibson Filed By Appellant With
The Court Of Appeals On Or About December 12th, 1962**

AFFIDAVIT

**STATE OF FLORIDA }ss.
COUNTY OF DADE }**

COMES NOW Henry L. Gibson, of 6701 S.W. 26th Terrace, Miami 55, Florida, Dade County, and after being duly sworn, deposes and says:

(1) That he is a member of Local 46, Miami Printing Pressmen's Union, the appellant in the above-styled proceedings, and has been a member of said Local 46 for over a decade. As a member of Local 46, and as an employee of the Miami Herald Publishing Company, affiant has participated in the current economic strike being conducted against the Miami Herald Publishing Company since its inception on August 1st, 1961.

(2) Affiant is Chairman of the Finance Committee of Local 46 and has been Chairman of such Finance Committee since the inception of the strike on August 1st, 1961. As such, affiant is personally familiar with the number of strikers participating in such strike, and with their individual economic circumstances.

(3) Affiant was the duly appointed observer for Local 46 at the National Labor Relations Board election conducted on July 25th, 1962, and also at the rerun election conducted on December 5th, 1962. As such, affiant has personal knowledge of the number of economic strikers who voted in each of those two elections.

(4) At the July 25th, 1962, N.L.R.B. election, over one hundred economic strikers and members of Local 46 voted in such election. However, in the rerun December 5th election, only sixty-seven economic strikers voted in such election.

(5) The reason that substantially fewer economic strikers were able to vote in the December 5th election as compared with the July 25th election is that there was a diminution in the number of strikers during the period from July 25th, 1962, to December 5th, 1962, which such diminution is customary and usual in the course of an extended strike, and was for the further reason that a substantial number of the economic strikers, in excess of twenty-five, without abandoning the strike have found it necessary to take temporary employment as pressmen in other cities of the United States and are scattered in such cities throughout the United States holding temporary jobs in their trade. These persons have not abandoned the strike as demonstrated by the fact that they are continuing to financially support the strike, but have been forced by their economic circumstances to take temporary employment in their trade in other cities. These strikers who have taken such temporary employment in other cities were not able to return to Miami to participate in the December 5th rerun election both because of the expense involved and also because of the jeopardy of losing their temporary employment by taking such leave. In fact, only three of the strikers who have taken temporary employment in other cities were able to return for the December 5th rerun election.

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(6) The number of economic strikers who have been required by their economic necessity to take temporary employment as pressmen in other cities in the United States as far away in some cases as San Francisco, California, is in excess of thirty.

Further affiant sayeth not.

/s/ HENRY L. GIBSON
HENRY L. GIBSON

SUBSCRIBED AND SWORN TO before me this 11 day
of December, 1962.

/s/ SHIRLEY M. WOODWARD
Notary Public, State of
Florida

BRIEF FOR APPELLEES

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17459

MIAMI NEWSPAPER PRINTING PRESSMEN'S UNION,
LOCAL 46, APPELLANT

v.

FRANK W. McCULLOCH, ET AL., INDIVIDUALLY AND
AS CHAIRMAN AND AS MEMBERS OF AND CONSTI-
TUTING THE NATIONAL LABOR RELATIONS BOARD,
APPELLEES

On Appeal from An Order of the United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 23 1963

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National Labor Relations Board.

QUESTION PRESENTED

Whether the District Court properly concluded that it lacked jurisdiction to review the Board's determination that a certain representation election should be set aside as improperly conducted and that a subsequent election should be held.

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**United States Court of Appeals
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v.

**FRANK W. McCULLOCH, ET AL., INDIVIDUALLY AND
AS CHAIRMAN AND AS MEMBERS OF AND CONSTITU-
TING THE NATIONAL LABOR RELATIONS BOARD,
APPELLEES**

**On Appeal from An Order of the United States
District Court for the District of Columbia**

BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia (J.A. 42) denying appellant's motion for a preliminary injunction and granting appellees' motion to dismiss the complaint. The complaint sought to enjoin the conduct of a certain representation election

directed by the Regional Director for the Board's Twelfth Region, pursuant to Sections 9 and 3(b) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*), hereafter referred to as the Act.¹ The complaint also sought to compel appellees to certify the results of an earlier election conducted by said Regional Director. The jurisdiction of this Court is invoked under 28 U.S.C. 1292(1) and 1294.

COUNTERSTATEMENT OF THE CASE

The undisputed facts, as set forth in the District Court's findings of fact, the complaint, and the exhibits thereto may be summarized as follows:

On June 29, 1962, the Regional Director for the Twelfth Region, National Labor Relations Board, issued a Decision and Direction of Election in Board Case No. 12-RC-1471, in which, pursuant to a petition earlier filed by appellant, he directed that a representation election be held among the pressroom employees of the Miami Herald Publishing Company (hereinafter "the Company"). That election was subsequently scheduled for July 25, 1962. Thereafter, the Company, in accordance with Section 102.67(b) of the Board's Rules and Regulations (see Appendix C, *infra*, pp. 34-35) filed with the Board a timely request for review of the Regional Director's Decision and Direction of Election. The Board,

¹ The relevant portions of the Act are set forth in the Appendix to appellant's brief, pp. 1a-3a, and in Appendix A, *infra* p. 81.

by telegraphic order of July 20, 1962, denied the Company's request for review (J.A. 39-40, 5).

On July 24, 1962, the day before the scheduled election, the Company instituted an action in the United States District Court for the Southern District of Florida, Tampa Division, seeking to enjoin the Regional Director from conducting that election. In its complaint, the company alleged, *inter alia*, that the Board's denial of its request for review of the Regional Director's Decision and Direction of Election had been invalid in that it was ruled upon by one member of the Board, instead of by at least three members, as required by Section 3(b) of the National Labor Relations Act. The court permitted the election to proceed as scheduled, but ordered the ballots impounded pending final determination of the proceedings before it. On August 6, 1962, the Court ruled that it had jurisdiction of the Company's suit and scheduled a hearing on the merits of the complaint (J.A. 40, 5, 29-30).

Prior to the hearing on the merits, the Board issued an order, dated August 22, 1962, in which it vacated its prior order of July 20 denying the Company's request for review of the Regional Director's Decision and Direction of Election, granted that request, and set aside the election conducted on July 25, 1962 (J.A. 40, 6, 27-28). Thereafter, the Florida District Court, on motion of the defendant Regional Director, dismissed the Company's suit as moot on the grounds that the Board's order of August 22, setting aside the July 25 election, had granted the Company the relief it sought. The court

took this action over the objections of the Company and appellant, both of whom urged, as appellant does here, that the Board had improperly set aside the July 25 election (J.A. 40, 29-34).²

On August 24, 1962, 2 days after its order granting the Company's request for review and setting aside the election of July 25, the Board requested briefs from both appellant and the Company on the questions involved in the Board's review of the Regional Director's Decision and Direction of Election (J.A. 41, 7). Both filed briefs, and, on November 8, 1962, the Board issued a Decision on Review and Remand, affirming the Regional Director's Decision and Direction of Election, and directing the Regional Director to conduct a rerun election pursuant thereto. The Board's decision reserved the question of the voting eligibility under Section 9(c)(3) of the Act of replaced economic strikers who had been on strike for longer than 12 months,³ stating that it would determine that question "should the votes of the economic strikers be sufficient in number to affect the results of the election . . ." Accordingly, the Board directed the Regional Director to challenge the ballots of all such strikers (J.A. 41, 7, 23-26). Subsequently, the Regional Director scheduled

² Appellant, though not a party to the Florida litigation, participated fully therein, attending hearings and filing briefs *amicus curiae* (J.A. 40-41, 32-33).

³ Appellant's members had been on strike against the Company since August 1, 1961, in connection with a dispute over the terms of a collective bargaining contract (J.A. 4, 8).

the rerun election for December 5, 1962 (J.A. 41, 9), and this suit followed.

In its complaint, filed November 29, 1962, appellant alleged that the Board, by failing to certify the results of the July 25 election, and by ordering that a second election be held, had violated Section 9(c) (1) and (3) of the Act. Appellant sought an order restraining the Board from destroying the ballots cast in the July 25 election, and further directing the Board to count those ballots and to certify the results thereof.⁴ Appellant also requested the District Court to enjoin the Board from conducting the election scheduled for December 5 (J.A. 8-10). Appellees moved to dismiss the suit, or in the alternative, for summary judgment in their favor, on the grounds that the District Court lacked jurisdiction of the subject matter, that the suit was premature, and that, in any event, the Board's actions were proper (J.A. 37). On November 30, 1962, the District Court, after hearing, denied appellant's motion for a temporary restraining order (J.A. 21-22). On December 4, 1962, after further hearing, and the filing of memoranda by both parties, the District Court granted appellees' motion to dismiss the complaint on the ground that the court lacked jurisdiction over the subject matter of the action "because plaintiff has failed to establish that the representation determinations complained of violated either a

⁴ The ballots cast in the July 25 election, previously in the custody of the Florida court, were, by order of that court, to be returned to the Board on December 7, 1962 (J.A. 35).

mandatory provision of the National Labor Relations Act or constitute a deprivation of due process under the Constitution of the United States" (J.A. 41-42). In addition, the court held appellants' action to be premature (*ibid.*).

On December 5, 1962, this Court, after hearing, denied appellant's motion to stay the election scheduled for that day, but ordered the ballots cast therein to be impounded pending further order of the Court. On December 21, 1962, this Court entered an order continuing in effect that portion of the order of December 5 impounding the ballots cast on that date and further ordering appellees to impound the ballots cast in the election of July 25 until final disposition of this appeal.

SUMMARY OF ARGUMENT

1. The District Court properly granted appellees' motion to dismiss the complaint because it lacked jurisdiction to review the Board's determination, in a representation proceeding, that the election of July 25 should be set aside and another election conducted. Under established principles, district court review is available only if appellant can demonstrate that the Board determination complained of contravened a mandatory requirement of the Act or violated constitutional protections. Review is clearly barred with respect to determinations which require the exercise of administrative judgment or discretion. *Leedom v. Kyne*, 358 U.S. 184; *Milk and Ice Cream Drivers and Dairy Employees Union, Local 98 v. McCulloch*,

U.S. App. D.C. , 306 F. 2d 763; *Leedom v. IBEW*, 107 U.S. App. D.C. 357, 278 F. 2d 237; *International Association of Tool Craftsmen v. Leedom*, 107 U.S. App. D.C. 268, 276 F. 2d 514, cert. denied, 364 U.S. 815. The Board's determination that a particular representation election should be set aside as invalidly conducted does not involve a "specific prohibition in the Act" (*Leedom v. Kyne, supra* at 188), but rather falls within "the wide area of determinations which depend on the Board's expertise and discretion" (*Tool Craftsmen v. Leedom*, 107 U.S. App. D.C. at 270, 276 F. 2d at 516). Nor does the Board's action in the instant case infringe appellant's constitutional protections. Accordingly, the court below correctly concluded that it was without jurisdiction.

2. In any event, the Board's action in setting aside the July 25 election was reasonable and proper. One of the steps in the Board procedure which culminated in that election was the denial of the Company's request for review of the Regional Director's Decision and Direction of Election. It is undisputed that the denial of this request was the action of a single member of the Board, to whom the Board had delegated its power to rule on such requests. Section 3(b) of the Act, however, precludes the Board from delegating its powers to any group of less than three members. When this was called to the Board's attention in the Company's district court action, the Board reconsidered the propriety of its procedure

and concluded that a review by three members was more consonant with the statutory scheme. Accordingly, the Board, of its own motion, vacated the prior single-member order denying the Company's request for review, granted that request, and set aside the July 25 election. In brief, "the Board properly recognized the gravity of the contention [that it had erred] and sought to meet it by doing what the court could have compelled." *Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 375. This action was, we submit, both reasonable and proper. Appellant's contrary contention, that since the Board ultimately affirmed the Regional Director's Decision and Direction of Election, it should have certified the results of the July 25 election, fails to take account of the fact that there was an intervening step between the Regional Director's Decision and the actual conduct of the July 25 election, i.e. the denial of the Company's request for review by a single member of the Board. The Board having concluded that this intervening step was not fully compatible with the statute, it quite properly set aside the July 25 election and ordered a second election held, even though it ultimately determined that the Regional Director's Decision and Direction of Election was, on its merits, correct. It is of no consequence, of course, that the prior, single-member review cannot be shown to have affected the results of the July 25 election. The requirement of a three-member Board, like the analogous statutory requirement of a three-judge court in certain cases, is not

a broad social measure to be liberally construed, but rather a technical rule of procedure, effective compliance with which can be insured only by insisting on "strict adherence to the [statutory] command." *Ayrshire Collieries v. U.S.*, 331 U.S. 132, 137.

3. There is no merit to appellant's argument that the Board denied it due process of law under the Constitution by the procedure employed in setting aside the July 25 election.

a. Appellant cannot, in any realistic sense, claim that it did not have a timely opportunity to present to the Board arguments supporting its position that the results of the July 25 election should be certified. While it is true that no such opportunity was afforded appellant prior to the issuance of the Board's order setting aside that election, appellant was subsequently given an opportunity, of which it took full advantage, to argue to the Board that the July 25 election had been erroneously set aside, and that the results of that election should be certified. "The demands of due process do not require a hearing . . . at any particular point . . . in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-153.

b. Similarly lacking in merit is appellant's assertion that the Board violated due process requirements by setting aside the July 25 election without articulating its reasons for so doing. Initially, the requirement that an administrative agency articulate the reasons for action taken by it is not based on

constitutional grounds, but is entirely a product of judicial review of administrative actions. Thus, a statement of the reasons underlying agency action enables an aggrieved party to plan his case before the reviewing court, and, furthermore, gives that court a better understanding of the action it is called on to review. In the instant case, albeit the Board has not, in so many words, stated why it set aside the July 25 election, the reason for this action is plain. Thus, as we have shown (*supra*, pp. 7-8), and as is evident from the sequence of events (Counter-statement, *supra*, pp. 3-4), the Board set aside the July 25 election in response to the Company's allegations, presented for the first time in its suit in the Florida District Court, that the Board's single-member review procedure was unlawful under Section 3(b) of the Act. Indeed, appellant has, both in this proceeding, and previous thereto, in a brief filed with the Board, amply demonstrated its awareness that this was the basis of the Board's action. Thus, we submit, neither appellant nor the Court can entertain any reasonable doubt as to why the Board set aside the July 25 election.

ARGUMENT

I. The District Court Properly Granted Appellees' Motion To Dismiss the Complaint

A. *Introduction—Prerequisites to establishing jurisdiction*

Appellant, a labor organization allegedly aggrieved by a Board determination in a representation pro-

ceeding, sought to have the court below review and set aside that determination. It is settled law in this Circuit, however, that a federal district court lacks jurisdiction to entertain an action seeking to review and set aside a Board decision in a representation proceeding, except where the determination complained of clearly transgresses a mandatory requirement of the statute or violates constitutional protections. *Milk and Ice Cream Drivers and Dairy Employees Union, Local 98 v. McCulloch*, U.S. App. D.C. , 306 F. 2d 763; *Leedom v. IBEW*, 107 U.S. App. D.C. 357, 278 F. 2d 237; *International Association of Tool Craftsmen v. Leedom*, 107 U.S. App. D.C. 268, 276 F. 2d 514, cert. denied, 364 U.S. 815; *Leedom v. Norwich Printing Specialties, Local 494*, 107 U.S. App. D.C. 170, 275 F. 2d 628, cert. denied, 362 U.S. 969; *National Biscuit Division v. Leedom*, 105 U.S. App. D.C. 117, 265 F. 2d 101, cert. denied, 359 U.S. 1011. Accord: *Local 1545, Carpenters v. Vincent*, 286 F. 2d 127 (C.A. 2); *McLeod v. Local 476, United Brotherhood of Industrial Workers*, 288 F. 2d 198 (C.A. 2). See also, *Leedom v. Kyne*, 101 U.S. App. D.C. 398, 249 F. 2d 490, affirmed, 358 U.S. 184. Conversely, the foregoing cases also establish that the federal district courts may not review representation matters "in the wide area of determinations which depend on the Board's expertise and discretion." *International Association of Tool Craftsmen v. Leedom*, *supra*, 107 U.S. App. D.C. 268, 276 F. 2d at 516, quoting from *Leedom v. Kyne*,

supra, 101 U.S. App. D.C. at 399, 249 F. 2d at 491, affirmed, 358 U.S. 184.⁵

Appellant alleges that the Board erred in setting aside the July 25 election and ordering a second election for December 5. As we show below, however, the action of the Board in this respect falls within "the wide area of determinations which depend on

⁵ With respect to the language quoted by appellant from *The Greyhound Corp. v. Boire*, 205 F. Supp. 686 (S.D. Fla.), affirmed 309 F. 2d 397 (C.A. 5), and from the opinion of Judge Friendly in *Empresa Hondurena de Vapores, S.A. v. McLeod*, 300 F. 2d 222 (C.A. 2) (appellant's brief, pp. 13-14), suggesting that district court jurisdiction to review Labor Board representation determinations may not be limited to the two categories above stated, i.e. where the determination complained of clearly transgresses a mandatory requirement of the statute or violates constitutional protections, we respectfully refer the Court to the subsequent decision of the Supreme Court in *Empresa*, reported sub nom. *McCulloch v. Sociedad Nacional de Marineros de Honduras*,

U.S. , 52 LRRM 2424 (February 18, 1963). In the course of its decision in that case, the Supreme Court pointed out that *Leedom v. Kyne*, 358 U.S. 184, created only a "limited exception" to the general lack of district court jurisdiction over Board representation determinations, and that, in *Kyne*, judicial intervention was permitted only because the Board's order was "in excess of its delegated powers and contrary to a specific prohibition in the Act" 52 LRRM at 2428. While concluding that the district court had jurisdiction in the case before it, the Supreme Court expressly stated that its conclusion was "not to be taken as an enlargement of the exception in *Kyne*" (*ibid.*). We further point out that the Fifth Circuit's decision in *Greyhound* is in conflict with the decisions of this Court (see: *General Cable Corp. v. Leedom*, 107 U.S. App. D.C. 357, 359, 278 F.2d 237, 239; *Atlas Life Insurance Co. v. Leedom*, 109 U.S. App. D.C. 97, 284 F.2d 231; and cases cited *supra*, p. 11), and that the Supreme Court, on April 15, 1963, granted the Board's petition for certiorari to review that decision.

the Board's expertise and discretion" (*Tool Craftsmen v. Leedom, supra*), and was not a decision "made in excess of [the Board's] delegated powers and contrary to a specific prohibition in the Act" (*Leedom v. Kyne*, 358 U.S. at 188). Moreover, the Board's action in no way infringed appellant's constitutional rights. Accordingly, the district court properly granted appellees' motion to dismiss the complaint.*

- B. *The Board's decision to set aside the election of July 25 did not violate any statutory mandate, but, to the contrary, was a reasonable and proper exercise of the Board's discretion*
 1. *The Board violated no statutory mandate in setting aside the election of July 25*

The gravamen of appellant's complaint is that the Board's action in setting aside the election of July

* Appellant's assertion that the District Court had jurisdiction under 28 U.S.C. 1361 is without merit. The legislative history of this recent addition to the Judicial Code makes it plain that it was not intended to subject additional administrative actions to district court review. Rather it sought to permit district courts outside the District of Columbia to grant relief in the nature of mandamus in those cases over which they would otherwise have jurisdiction. Thus, the sole effect of this section is to correct the historic anomaly by which district courts outside the District of Columbia lacked power to issue mandamus orders. "This bill is not intended to give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia. . ." H.R. Rep. No. 536, 87th Cong., 1st Sess. 2 (1961). See also 108 Daily Cong. Rec. 18221 (1962), and see generally Byse, *Proposed Reforms in Federal Nonstatutory Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479, 1507-1508 (1962).

25 was violative of Section 9(c) (1) of the Act, which provides that, when the Board directs an election by secret ballot, it "shall certify the results thereof." However, appellant does not, and indeed cannot, contend that that provision requires the Board to certify the results of *all* elections conducted by it. To the contrary, it is undisputed that the Board's duty to certify is limited to those elections determined to have been properly conducted. And, it is equally plain that the determination of whether or not an election has been properly conducted constitutes a matter within the broad discretionary authority of the Board. Thus, it has been stated that "the propriety of the Board's determination that [an] election should be set aside must be considered in light of the principle that 'Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees', *N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324," *N.L.R.B. v. National Container Corp.*, 211 F. 2d 525, 532 (C.A. 2); *N.L.R.B. v. National Truck Rental Co.*, 99 U.S. App. D.C. 259, 262-263, 239 F. 2d 422, 425-426, cert. denied, 352 U.S. 1016. The Board having such broad discretion in determining whether an election should be set aside as invalid, its decision in this respect may not, under the decisions of this Court, be reviewed in a district court proceeding.⁷

⁷ Appellant concedes that if the Company had attacked the validity of the July 25 election by filing appropriate charges with the Board, "The Board would be in position to argue

Appellant's remaining contentions do nothing to cure this fundamental jurisdictional defect. Thus, appellant asserts that the Board's action in setting aside the first election and in holding a subsequent election on December 5, more than 12 months after the commencement of the strike, destroys the statutory right of replaced economic strikers to vote, a right allegedly secured by Section 9(c)(3) of the Act. Section 9(c)(3) does not, however, unqualifiedly guarantee to replaced economic strikers a right to vote. It simply provides that if an election is conducted within 12 months after the commencement of a strike, then such strikers shall be eligible to vote (subject to Board regulation). Thus, if the Board properly set aside the July 25 election, so that no valid election was conducted within the relevant 12-month period, then the predicted loss of voting rights by the economic strikers is, so far as the statute is concerned, *damnum absque injuria*.⁸

with some force that its duty to certify in such circumstances was within the area of administrative discretion committed to it by Congress." (Brief, p. 10) We fail to see in what way the area of the Board's discretion is lessened by the fact that the challenge to its procedures took the form of a suit for injunctive relief rather than some other form. It is one thing to argue that the Board cannot be compelled to act when its own internal procedures are not properly invoked; it is quite another thing to argue, as appellant appears to, that the Board *may not* act under such circumstances, or, if it does, that the scope of its discretion is somehow lessened. See, *N.L.R.B. v. Monsanto Chemical Co.*, 205 F. 2d 763 (C.A. 8); *Sun Oil Co. v. Federal Power Commission*, 256 F. 2d 28, 233, 239 (C.A. 5), cert. denied, 358 U.S. 872.

⁸ Indeed, it is not even certain at this point that the strikers in question will be denied the opportunity to vote. The

Similarly, while appellant urges (Brief, pp. 10-11) that the Board failed to exercise its statutory power under Section 3(b) to stay the first election, and thus that the results of that election must be certified, there is nothing in Section 3(b) which limits the Board's supervisory power over representation elections to the power to issue a stay thereof,

Board's Decision on Review and Remand of November 8, 1962, allows replaced economic strikers to vote, subject to challenge. It expressly reserves the resolution of the question of their voting eligibility, stating that the question will be determined only if their votes are sufficient in number to affect the results of the election. Thus, it may well be, for all that is presently known, that, if the votes of the economic strikers are decisive, the Board will determine these votes to have been validly cast.

Nor may appellant argue that such a determination is impossible under Section 9(c)(3). Section 9(c)(3) has not yet been construed by the Board or any court of appeals with respect to the problems here presented. It may be that the Board will hold the 12-month limitation on the voting rights of economic strikers inapplicable in a situation like the instant one where last-minute litigation instituted by the employer is a factor in delaying the election until after the 12-month period. Certainly it would appear that the Board, "the agency charged with principal responsibility for administering the legislation, acting in the light of its special experience and expertise" (*Los Angeles Mailers Union No. 9 v. N.L.R.B.*,

U. S. App. D. C. , 311 F. 2d 121, 124) should first be given the opportunity to construe Section 9(c)(3) in this situation, rather than have this Court accept appellant's predictions as to the construction the Board will, or must, adopt. It was precisely this uncertainty as to whether economic strikers would be denied voting rights, as well as the possibility that appellant would prevail in the December 5 election, that led the district court to dismiss appellant's suit to enjoin that election on the alternative ground that that suit was premaure (J.A. 41).

or which precludes the Board from doing what it did in the instant case, i.e., setting aside an election after the ballots have been cast therein on the grounds that that election was improperly conducted.*

In sum, the basic question posed by all appellant's statutory arguments is the propriety of the Board's determination that the election of July 25 was improperly conducted and should be set aside. Stated otherwise, appellant by its action in the court below sought to review the Board's determination that its denial of the employer's request for review by a single member warranted the setting aside of the election subsequently conducted. While we show below that even reaching the merits of the Board's decision it is entitled to stand, it is sufficiently dispositive of appelle-

* Nor, contrary to appellant's assertion (Brief, pp. 10, 24), is there anything in the Board's Rules and Regulations which prohibits such action by the Board. Rather, to the extent relevant, the Board's Rules would support its action in setting aside the election of July 25, 1962. For those Rules expressly provide that where a request for review of a regional director's decision and direction of election is filed with the Board, "the regional director, in the absence of a waiver, may issue a notice of election *but shall not conduct any election or open and count any challenged ballots until the Board has ruled upon any request for review which may be filed.* Sec. 102.67 of the Board's *Rules and Regulations and Statements of Procedure, Series 8* (Appendix C, *infra*, pp. 34-35) (emphasis added). Since, as we show *infra*, pp. 20-24, the original denial of the employer's request for review cannot properly be considered an action of the "Board" in the statutory sense, the Regional Director was precluded under the Board's own Rules from conducting the election of July 25, 1962.

lant's suit to note that the Board's action transgresses no "specific prohibition in the Act" (*Leedom v. Kyne*, 338 U.S. at 188), but rather falls within "the wide area of determinations which depend upon the Board's expertise and discretion" (*International Association of Tool Craftsmen v. Leedom*, 107 U.S. App. D.C. at 270, 276 F. 2d at 516). The fact that the Board's determination would constitute a proper matter for judicial review under Section 10(e) or (f) of the Act does not, as this Court has consistently held, make such an exercise of administrative judgment reviewable by a district court suit. See cases cited, *supra*, p. 11. Thus, as this Court specifically stated in *International Association of Tool Craftsmen v. Leedom*, 107 U.S. App. D.C. at 270, 276 F. 2d at 516:

We need not decide whether we would sustain the Board's view if the question were presented to us in an appeal under the judicial review provisions of § 10 of the Act. 61 Stat. 146, as amended, 29 U.S.C.A. § 160. We need only decide, as we do, that the statutory language itself and the legislative history sufficiently support its position to eliminate the essential requirement for invoking the District Court's equity jurisdiction, namely, a showing that the Board violated a "clear and mandatory" statutory prohibition by according controlling consideration to bargaining history.

To permit district court review of the instant case, would be, we submit, inconsistent with the prior decisions of this Court, contrary to the recent admoni-

tion of the Supreme Court in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, U.S. , 52 LRRM 2424, 2428 (Feb. 18, 1963), and would create an exception to non-reviewability "most difficult to define, or to confine within tolerable boundaries." *McLeod v. Local 476, United Brotherhood of Industrial Workers*, 288 F. 2d 198, 201 (C.A. 2) (Madden, J.).¹⁰

2. *The Board's action in setting aside the July 25 election was reasonable and proper*

Assuming, *arguendo*, that the district court had jurisdiction to review the Board's action in setting aside the July 25 election, it is well settled that representation determinations of this nature are entitled to stand, on review, unless they are arbitrary and capricious. *N.L.R.B. v. Waterman Steamship Co.*, 309 U.S. 206, 226; *N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324, 333; *N.L.R.B. v. Mattison Machine Works*, 365 U.S. 123; *N.L.R.B. v. National Truck Rental Co.*, 99 U.S. App. D.C. 259, 262-263, 239 F. 2d 422, 425-426; *National Van Lines v. N.L.R.B.*,

¹⁰ As Judge Madden further stated in language equally applicable here (*ibid.*):

If the Board has, in the instant case, exercised its discretion unwise, even unreasonably, that raises no constitutional issue. Congress, by its refusal to confer jurisdiction on the District Courts, and the courts, by their adoption of the general rule subject only to the two exceptions recited above, have made the important decision that an occasional unreasonable action by the Board, though it goes uncorrected by the courts, is a lesser evil than would be the frustration of seasonable elections by a broadened exposure of election questions to litigation.

273 F. 2d 402, 407 (C.A. 7); *N.L.R.B. v. National Container Corp.*, 211 F. 2d 525, 532 (C.A. 2); *N.L.R.B. v. Huntsville Mfg. Co.*, 203 F. 2d 430, 434 (C.A. 5); *N.L.R.B. v. S. H. Kress & Co.*, 194 F. 2d 444, 446 (C.A. 6); *N.L.R.B. v. National Plastic Products Co.*, 175 F. 2d 755, 758 (C.A. 4). We show below that the Board's decision to set aside the July 25 election was neither arbitrary nor capricious, but, to the contrary, was a reasonable and proper exercise of the Board's discretionary power over the conduct of representation elections.

Section 3(b) of the Act authorizes "the Board . . . to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof." This is subject to the exception "that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph. . ." When the foregoing provision was added to the Act in 1959, the Board was confronted with the problem of implementing it, particularly the part permitting the Board, in its discretion, to review a decision by the regional director. What the Board did was to promulgate certain standards for the exercise of its discretionary review power (Rules and Regulations of the National Labor Relations Board, Sec. 102.67(c) (Appendix C, *infra*, p. 35).

Then the Board delegated to a single member, on a rotating basis, the power to determine which requests for review were not within those standards. Such requests would be denied by the single member, acting on behalf of the Board.

The election of July 25 was conducted pursuant to this procedure, the Company's request for review of the Regional Director's Decision and Direction of Election being denied by a single member of the Board. However, the Company's subsequent suit in the district court in Florida, alleging this procedure to be violative of the first sentence of Section 3(b), which authorizes the Board to delegate its decisional powers to a group of not less than three members, caused the Board to reconsider the propriety of this procedure as a means of discharging the Board's reviewing function with regard to representation cases under the 1959 amendments to the Act. The Board, after careful study of the matter, concluded that review of the action taken by a regional director in a representation case entailed the exercise of the Board's decisional powers to such an extent that the requirements and purposes of the statute, particularly the first sentence of Section 3(b), were better served by not delegating that reviewing function to one Board member. Accordingly, the Board, on its own motion, vacated the prior single-member order denying the Company's request for review, granted that request, and set aside the July 25 election, which had followed the invalid denial of the Company's request for review. Subsequently, the Board reviewed the Regional Director's Decision and Direction of

Election on its merits, affirmed it, and ordered that a second election be held pursuant thereto.

Appellant, in seeking to compel the Board to certify the results of the July 25 election, asserts that the Board acted arbitrarily and capriciously in setting aside that election. The basis for this assertion is that the Board ultimately found the Company's objections to the Regional Director's Decision and Direction of Election to be without merit and affirmed that decision. From this, appellant argues that the Board should also have held the July 25 election to have been validly conducted and certified the results thereof. This argument, however, fails to take account of the fact that there was an intervening step between the Regional Director's decision and the actual conduct of the election, i.e., the denial of the Company's request for review by a single member of the Board. The Board having concluded that this intervening step was not fully compatible with the statute, we submit that it quite properly set aside the July 25 election and ordered a second election, even though it ultimately determined that the Regional Director's Decision and Direction of Election was, on its merits, correct. Furthermore, it is of no consequence that the prior, single-member review cannot be shown to have affected the results of the July 25 election. The statutory requirement of a three-member Board, like the analogous statutory requirement of a three-judge court in certain cases,¹¹ is not a broad social measure

¹¹ 28 U.S.C. 2281.

which can be liberally construed, but rather a technical rule of procedure, effective compliance with which can be insured only by insisting on "strict adherence to the [statutory] command." *Ayrshire Collieries v. U.S.*, 331 U.S. 132, 137. See also, *U.S. v. Tucker Truck Lines*, 344 U.S. 33, in which the Supreme Court stated that a technical defect in the appointment of a Trial Examiner, though in no way shown to have affected his decision would (if timely raised) be "an irregularity which would invalidate a resulting order . . . (*id.* at 38)." Cf. *N.L.R.B. v. Highland Park Mfg. Co.*, 341 U.S. 322, 325-326.

In sum, as a result of the Company's contentions in its district court suit against the Regional Director, the Board was made aware for the first time of a serious defect in the procedure utilized by it in ruling on the Company's request for review of the Regional Director's Decision and Direction of Election. That such variance from procedural regularity would, in the normal course of events, result in judicial setting aside of the subsequent representation election is clear. Cf. *N.L.R.B. v. West Texas Utilities Co.*, 214 F. 2d 732 (C.A. 5); *N.L.R.B. v. Sidran Sportswear*, 181 F. 2d 671 (C.A. 5). In the instant case, the Board, being advised and convinced of the defect did no more than what it presumably could have been required to do by the appropriate court of appeals under the statutory review procedure, i.e., it set aside the July 25 election on the basis of the procedural irregularity discussed. As the Supreme Court stated in *Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 375, "the Board properly recognized

the gravity of the contention [that it had erred] and sought to meet it by voluntarily doing what the court could have compelled."

Stated otherwise, if the Board had gone ahead and permitted the results of the July 25 election to be certified even though it was aware that an invalid procedure had been followed, the Company would in all probability have refused to bargain on the ground of this defect in the election procedure; if the Board nevertheless ordered the Company to bargain, it would then have obtained review of this order and the underlying election in the court of appeals; and, after a year or more of additional litigation, the court would presumably have set aside the bargaining order because of the defect in the election procedure. At this point, it would not only be questionable whether the Board would be free to cure the defect and proceed to hold another election, but appellant's striking members would undoubtedly be even more dispersed than it alleges them presently to be. Instead of subjecting the parties to this additional litigation, delay and uncertainty, the Board has recognized the defect at an early stage of the proceeding and has taken steps to cure it. (And see n. 8, *supra*). Surely such action on the part of the Board cannot be said to be arbitrary or capricious. Thus, even if the district court had jurisdiction, the Board's action would be entitled to stand.¹²

¹² Appellant, recognizing that the Board vacated the July 25 election because it was unwilling to defend an administrative practice seen by it to be in violation of the requirements of Section 3(b) of the Act, appears to argue that

C. *Appellant's constitutional arguments are without merit*

1. *The contention that appellant was denied notice and an opportunity to be heard*

There is no merit to appellant's argument that the Board's action in setting aside the July 25 election constituted a denial of due process under the Constitution because taken "without notice or an opportunity to be heard" (Brief, p. 22). In the first

the Board, though convinced of the illegality of its practice, should have certified the results of the July 25 election in order to preserve, beyond question, the voting eligibility of its striking members. Surely, however, once the Board was convinced that the July 25 election had, due to its own procedural irregularities, been improperly conducted, it would have been wholly improper for the Board to certify the results of that election in order to benefit one or the other of the parties thereto.

Furthermore, while appellant suggests that the "device of a rerun election" was "wholly unknown to Board procedures heretofore" and that "the rerun election device was contrived by the Board for this day and this train only" (Brief, pp. 20, 21), we submit that such is not, in fact, the case. To the contrary, such elections are frequently held where employer conduct (*Lake Catherine Footwear, Inc.*, 133 NLRB 443; *Charles v. Weise Co.*, 133 NLRB 765; *Reliance Steel Products Co.*, 135 NLRB 730) or union conduct (*Lobue Bros.*, 109 NLRB 1182; *Bowman Biscuit Co.*, 123 NLRB 202; *Cleveland Trencher Co.*, 130 NLRB 600) is found to have interfered with a prior election. Furthermore, improprieties in its own election procedures have, on occasion, caused the Board to set one election aside and, as here, direct that another be held. See, e.g., *Strathmore Packing House Co.*, 61 NLRB 739; *Wayne Hale*, 62 NLRB 1393; *Yarborough Motor Co.*, 85 NLRB 1296; *National Truck Rental Co.*, 108 NLRB 1349; see also, *N.L.R.B. v. West Texas Utilities Co.*, 214 F. 2d 732 (C.A. 5); *N.L.R.B. v. Sidran Sportswear*, 181 F. 2d 671 (C.A. 5).

place, the question before the Board—whether the July 25 election should be set aside because of the conceded procedural irregularities preceding that election—involved no disputed issues of fact, so that a trial-type hearing was plainly unnecessary. *Mississippi River Fuel Corp. v. Federal Power Comm.*, 108 App. D.C. 284, 281 F. 2d 919, 927; *Sun Oil Co. v. Federal Power Comm.*, 256 F. 2d 233, 240 (C.A. 5), cert. denied, 358 U.S. 872. Furthermore, appellant cannot, in any realistic sense, claim that it did not have a timely opportunity to present to the Board arguments supporting its position that the results of the July 25 election should be certified. While it is true that no such opportunity was afforded appellant prior to the issuance of the August 22 order setting aside that election, the Board, on August 24, called for briefs from both appellant and the Company on the Company's motion to vacate the Regional Director's Decision and Direction of Election. At this time, the ballots cast in the July 25 election were in the custody of the District Court for the Southern District of Florida (where they remained until December 7, well after the Board's order of November 8 setting a second election). Thus as a practical matter, appellant was afforded the opportunity to, and indeed did, argue in its brief to the Board that the election of July 25 had been erroneously set aside and that the results of that election should be certified (see App. B, *supra*, pp. 32-33). Cf. *Mississippi River Fuel Corp. v. Federal Power Comm.*, 108 App. D.C. 284, 292, 281 F. 2d 919, 927. "The demands of the process do not require a hearing . . . at any

particular point . . . in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-153; *Inland Empire Council v. Millis*, 325 U.S. 697, 710. See also, *Ewing v. Mytinger & Castleberry, Inc.*, 339 U.S. 594, 598.¹³

2. *The contention that the Board stated no reason for setting aside the July 25 election*

Similarly lacking in merit is appellant's assertion that the Board violated due process requirements by setting aside the July 25 election without articulating its reasons for so doing. Initially, the requirement that an administrative agency articulate the reasons for action taken by it is not based on constitutional grounds, but is entirely a product of judicial review of administrative actions. 2. *Davis, Administrative Law*, Sec. 16.12 (1958). Thus, a statement of the reasons underlying agency action enables an aggrieved party to plan his case before the reviewing court, and, furthermore, gives that court a better understanding of the action it is called upon to re-

¹³ In this context, we point out that appellant errs in its assertions (Brief, pp. 11, 12, 18-19) that the Board awarded to the Company the "ultimate relief" sought by it prior to hearing appellant's objections thereto. In fact, the ultimate relief sought by the Company, i.e., that the Board vacate the Regional Director's Decision and Direction of Election, was denied by the Board. Thus, the record shows that the Board affirmed the aforesaid Decision and Direction of Election and, pursuant to appellant's original petition for certification of representatives, directed the Regional Director to conduct a rerun election.

view. "The courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 94. In all the cases on which appellant relies—*Phelps Dodge Corp. v. U.S.*, 313 U.S. 177; *Secretary of Agriculture v. U.S.*, 347 U.S. 645; *N.L.R.B. v. Capitol Transit Co.*, 95 U.S. App. D.C. 310, 221 F. 2d 864—it is fair to say that, as a matter of fact, neither the aggrieved party nor the reviewing court knew why the agency acted as it had; accordingly each of these cases was remanded to the agency for an explication of the action involved. The instant case, however, is wholly distinguishable and presents no basis for such a remand.¹⁴ For here, in contrast to the above-cited cases, there is no doubt as to why the Board took the action under question, i.e., set aside the July 25 election. It did so, as we have shown, and as is evident from the sequence of events (Counterstatement, *supra*, pp. 3-4), in response to the Company's allegations that the single-member review procedure was unlawful under Section 3(b) of the Act. Appellant has not only demonstrated in this proceeding its awareness that this was the basis for the Board's action (Brief, pp. 19,

¹⁴ In *S. E. C. v. Chenery Corp.*, *supra*, also relied on by appellant, the basis for the Court's remand was not that the agency involved gave no reasons for its action, but rather that those reasons were untenable. *Chenery* thus has no bearing on the problem here presented, i.e., whether agency action can be upheld in the absence of articulated reasons for that action, *in a situation in which neither the parties nor the Court can entertain any reasonable doubt as to what those reasons were.*

20, 21; J.A. 38), but, furthermore, in a brief urging the Board to reconsider and certify the results of the July 25 election, filed with the Board on September 10, long before this suit was instituted, appellant made plain that it was at that time fully cognizant of the reason for the Board's action (see App. B, *infra*, pp. 32-33). In sum, there is no question *why* the Board set aside the July 25 election; the only question is whether, by doing so, the Board acted in plain violation of a mandatory command of the Act or violated constitutional protections. For, as has previously been discussed, unless appellant can establish that the Board has done so, the district court was, as it held, without jurisdiction over the subject matter of appellant's action. See cases cited, p. 11, *supra*.¹⁵

¹⁵ Appellant argues that the Board violated Section 101.21(a) of its own Rules and Regulations by setting aside the July 25 election without following the review procedure set forth in those Rules and Regulations. The short answer to this is that such a violation, even if established, would be insufficient to vest the district court with jurisdiction. For, as has been discussed, a violation of a statutory mandate or constitutional duty is necessary to establish district court jurisdiction to review a Board representation determination. See especially, *Local 1545, Carpenters v. Vincent*, 286 F. 2d 127, 132-133 (C.A. 2); *McLeod v. Local 476, United Brotherhood of Industrial Workers*, 288 F. 2d 198 (C.A. 2); *Robinson v. McLeod*, 213 F. Supp. 111, 114-116 (S.D.N.Y.). Furthermore, Section 101.21(a), which applies where the Regional Director "decides the issues in a case" (App. brief, p. 24) has no applicability to the Board's determination that the July 25 election should be set aside on the basis of irregularities in the Boards' review procedure. For, as we have shown (*supra*, pp. 21-24), the issue of single-member review was not even raised before, much less decided by, the Regional Director.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

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National Labor Relations Board.

April 1963.

APPENDIX A

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), is as follows:

NATIONAL LABOR RELATIONS BOARD**SEC. 3**

* * * *

(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its power under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 12-RC-1471

In the Matter of:

THE MIAMI HERALD PUBLISHING Co., Employer,
andLOCAL NO. 46, MIAMI NEWSPAPER PRINTING PRESS-
MEN'S UNION, AFL-CIO, Petitioner.
BRIEF FOR PETITIONER, LOCAL NO. 46,MIAMI NEWSPAPER PRINTING PRESSMEN'S UNION,
AFL-CIO

* * * * *

(pp. 17-19) * * *

In this case *prior to the receipt of briefs* as authorized by sub-paragraph (g), the Board mistakenly granted Knight the ultimate relief sought by his request for review. This is plain error and one the Board should be quick to rectify, particularly where as here the Board had previously denied the Request and thereafter granted it *sua sponte* without notice.

But even in its present posture, there is no legal impediment to a Board order affirming the decision of the Regional Director as provided for in paragraph (j) of Section 102.67 upon its consideration of the record as a whole. Indeed, there is every reason for it to do so. Knight would seize upon an internal administrative procedure (perhaps devised by the Board for dis-

posing of the hundreds of baseless requests for review it receives) to disfranchise *all* its striking employees and "bust" the Union. As the Board's rules make plain, its internal policies are within the province of the Board, and an alleged infirmity therein should not be lent one party + the prejudice of another with such harsh results —to wit, the permanent disfranchisement of Knight's striking pressmen. For, stripped of unessentials, the real thrust of Knight's complaint to the District Court is the "fact" that its initial request was "denied" by a single member of the Board and therefore was not the action of the Board. This may or may not be, but in any event such internal procedures and their alleged invalidity should not become the basis for deciding the rights of parties on the merits. We think it would be presumptuous of Petitioner to defend to the Board its own administrative procedures, but we would point out that whether one or more members of the Board considered Knight's initial petition for review, certainly such petition was considered by each Board member upon reconsideration and will now be passed upon by the full Board. This procedure should satisfy even the most sensitive concept of due process and persuades that if the Board does find on this review that the Regional Director's decision should be affirmed and the Regional Director ordered to count the ballots cast in the election, investigate and hold a hearing on the challenges and certify the results thereof.

* * * *

APPENDIX C

The relevant provisions of the Rules and Regulations and Statements of Procedure, Series 8, as amended, (24 FR 9095, 26 FR 3888), are as follows:

SEC. 102.67. Proceedings before the regional director; Further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.

* * * *

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file seven copies of a request for review with the Board in Washington, D.C. Such request shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies shall not be filed and if submitted will not be accepted. Copies thereof shall be served simultaneously on all other parties to the proceeding and the regional director in the same manner used to file with the Board, except that if personal service is made upon the Board, service upon the other parties shall be made in such manner as would reasonably insure receipt by the other parties within 3 days after the date of service upon the Board. A statement of such service shall be filed simultaneously with the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the regional director: *Provided, however,* That the regional director, in the absence of a waiver, may issue a notice of election but shall not conduct any election or

open and count any challenged ballots until the Board has ruled upon any request for review which may be filed.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

REPLY BRIEF FOR APPELLANTS

IN THE

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 17,459

**MIAMI NEWSPAPER PRINTING PRESSMEN'S UNION
LOCAL 46, Appellant,**

v.

**FRANK W. McCULLOCH, ET AL,
INDIVIDUALLY AND AS CHAIRMAN AND AS
MEMBERS OF AND CONSTITUTING THE
NATIONAL LABOR RELATIONS BOARD, Appellees.**

**ON APPEAL FROM AN
ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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*United States Court of Appeals
for the District of Columbia*

APR 30 1963

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,459

MIAMI NEWSPAPER PRINTING PRESSMEN'S UNION
LOCAL 46, *Appellant*,

v.

FRANK W. McCULLOCH, ET AL,
INDIVIDUALLY AND AS CHAIRMAN AND AS
MEMBERS OF AND CONSTITUTING THE
NATIONAL LABOR RELATIONS BOARD, *Appellees*.

ON APPEAL FROM AN
ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

In its brief herein, the Board makes two points. First, that Section 9(c)(1) of the Act providing in relevant part that when the Board directs an election by secret ballot it "shall certify the results" was not violated by its refusal to certify the results of the July 25, 1962, election. The Board argues that such statute does not require it under all circumstances to certify the results of elections it has directed and, second, that the proceedings had before the Board subsequent to its telegraphic order of August 22, 1962, vacating the July 25 election, operated to cure any constitutional infirmity which might have attached to its without-notice-or-hearing telegraphic order of August 22.

The Board further argues that this is so in respect of any decisionally imposed requirement on an administrative agency to advance the reasons for actions taken by it. We shall consider these contentions briefly in the order stated above.

POINT I

THE BOARD'S CONTENTION THAT ITS ONE MEMBER REVIEW PROCEDURE MAY BE INFIRMED AND THEREFORE JUSTIFIED THE BOARD IN DEPARTING FROM THE STATUTORY REQUIREMENT THAT IT "CERTIFY THE RESULTS" OF ELECTIONS HAD PURSUANT TO SECTION 9 IS WHOLLY WITHOUT MERIT.

The Board contends that it is excused from certifying the results of the July 25 election since there was an intervening step between such election and its telegraphic vacation thereof on August 22, such step being a denial of the Company's request for review by a single member of the Board. This contention will not withstand even casual scrutiny.

The Board admits that Section 9(c)(1) of the Act is mandatory in terms (Board Brief, p. 14), pointing out only that the mandate of the Act requires certification of the results "of those elections determined to have been *properly conducted*." And then the Board concedes "that the prior single member review cannot be shown to have affected the results of the July 25 election" (Board Brief, p. 22). Thus, this case does not present "an election determined to have been *improperly conducted*." Quite the contrary. Accordingly, the cases relied upon by the Board (see footnote 12, Board Brief, p. 24, 25) in which rerun elections were directed upon a finding by the Board that employer or union conduct had unlawfully influenced the results of such

election are completely inapposite. Having ultimately found that the Regional Director's decision and direction of election was proper and absent even allegations respecting the actual conduct of the July 25 election, the Board was clearly required by the terms of Section 9(c)(1) "to certify the results thereof."

POINT II

THE PROCEEDINGS BEFORE THE BOARD FOLLOWING ITS AUGUST 22 TELEGRAPHIC ORDER DID NOT OPERATE TO CURE THE CONSTITUTIONAL AND ADMINISTRATIVE DEFECTS INHERENT THEREIN.

The Board argues in its same inconsistent vein that the proceedings had before it subsequent to the issuance of its August 22 telegraphic order can be resorted to with validity in aid of such order. The Board concedes that Appellants were denied notice or an opportunity to be heard prior to the entry of the August 22 order. But it argues that "as a practical matter Appellant was afforded the opportunity to and did argue in its brief to the Board subsequent to the August 22 order that the election of July 25 had been erroneously set aside" (Board Brief, p. 26). This argument misses the point.

The first comment to be made upon it is that in the August 22 order and without notice or hearing the Board granted the Company the ultimate relief it sought, i.e. the vacation of the July 25 election.

Second, the Board concedes that it "has not in so many words stated why it set aside the July 25 election" (Board Brief, p. 10) in obedience to the judicially spelled out requirements of administrative conduct. And, indeed, this entire argument is at odds with the reasons advanced to

this Court for vacating the July 25 election, i.e. that in the interim between July 25 and the Board order of August 22 the Company's request for review was denied by a single member of the Board. Certainly if the post August 22 proceedings before the Board cured the constitutional and administrative law deficiencies urged by Appellant, then such full-scale review by the Board would have plainly vitiated any claim of illegality which the Company could have asserted in respect of the Board's single member review policy.

This argument of the Board is as unsound as it is inconsistent.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed.

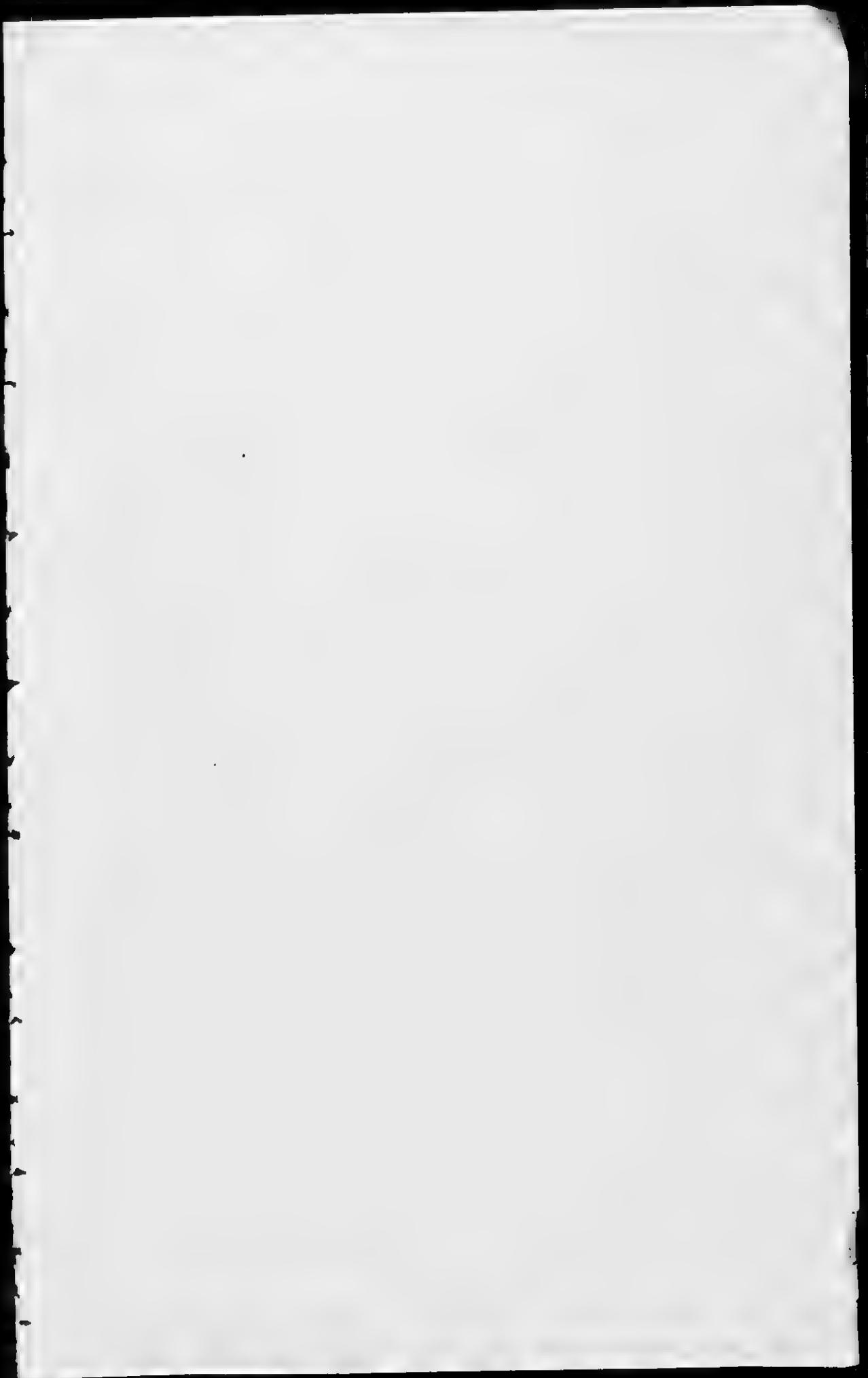
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JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
No. 17,459 for the District of Columbia Circuit

FILED MAR 14 1963

MIAMI NEWSPAPER PRINTING PRESSMEN'S
UNION, LOCAL 46,

Nathan J. Pugh
CLERK

Appellant,

vs.

FRANK W. McCULLOCH, et al, individually, and as
Chairman and as members of and constituting the
National Labor Relations Board,

Appellees.

On Appeal from an Order of The United States
District Court For The District of Columbia



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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**MIAMI NEWSPAPER PRINTING PRESSMEN'S
UNION, LOCAL 46,**

Appellant,

vs.

**FRANK W. McCULLOCH, et al., constituting the
National Labor Relations Board,**

Appellees.

JOINT APPENDIX

**CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES**

Complaint, filed November 29, 1962

Motion for Temporary Restraining Order, filed November 29, 1962

Affidavit of John S. McLellan, filed November 29, 1962

Memorandum and Order of Judge Leonard P. Walsh, dated November 30, 1962

Order Denying Motion for Temporary Injunction dated December 3, 1962

Motion of Defendants to Dismiss the Complaint, or, in the Alternative, for Summary Judgment in Their Favor, dated November 30, 1962

Findings of Fact, Conclusions of Law, and Order Denying Preliminary Injunction and Dismissing Complaint, dated December 4, 1962

Notice of Appeal, filed December 5, 1962

(Filed November 29, 1962)

**COMPLAINT FOR INTERLOCUTORY AND
PERMANENT INJUNCTION, DECLARATORY
JUDGMENT AND INCIDENTAL RELIEF**

Plaintiffs, by their attorneys, allege as follows:

1. This is a suit of a civil nature brought for the purpose of enjoining the defendants, individually and as Chairman and members of the National Labor Relations Board, from failing and refusing to count the ballots cast in a certain representation election directed by the Regional Director for the 12th Region of the National Labor Relations Board and to certify the results thereof as required by 29 U.S.C.A. §159(B), all in violation of plaintiff's rights to vote in such election established by the National Labor Relations Act as amended, 29 U.S.C.A. §159(c)(3).

Defendants' unlawful, arbitrary and capricious action to plaintiff's prejudice resulted from a decision on Review and Remand entered by defendants in a case entitled, "The Miami Herald Publishing Company, Employer, and Local No. 46, Miami Newspaper Printing Pressmen's Union, AFL-CIO, Case no. 12-RC-1471" which said order was entered by the defendants on November 8, 1962. Said decision on Review and Remand was entered by the defendants pursuant to the National Labor Relations Act as amended, 61 Stat. 136 et seq. as hereinafter more particularly stated. This action accordingly arises under an Act of Congress regulating commerce in that the order of the defendant Board sought to be reviewed and enjoined is being promulgated in violation of plaintiff's rights under said National Labor Relations Act as amended. The jurisdiction of this Court is founded upon 28 U.S.C.A. §1337 and Public Law 87-748, 76 Stat. 744 approved October 5, 1962. The sum in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000) Dollars.

2. Plaintiff, Local 46, Miami Newspaper Printing Pressmen's Union, is an unincorporated association organized as a local labor organization within the meaning and definition of the Labor Management Relations Act, 1947, 61 Stat. 136, maintaining its principal situs in Miami, Florida, and being composed of some 350 newspaper printing pressmen employed by the newspaper publishing industry in and around Miami, Florida. Said Local 46 is affiliated with the International Printing Pressmen and Assistants' Union of North America, an International labor union organized in 1869 for the purpose of representing employees in the printing industry in collective bargaining with various employers. Membership in Local 46 is open to all newspaper printing pressmen and apprentices and said Local 46 exists for the purpose of representing such categories of employees in collective bargaining with newspaper publishers in the Miami, Florida, area.

3. The defendant National Labor Relations Board, hereinafter called the "Board," is a federal agency created by the Labor Management Relations Act, 1947, 61 Stat. 136. Defendant Frank W. McCulloch is chairman of said Board with offices located at 1717 Pennsylvania Avenue, N.W., Washington, D.C., and as such chairman exercises duties and functions under and administers the National Labor Relations Act as amended. Said defendant is duly appointed and at all times hereinafter mentioned acted in the capacity as chairman of said Board as provided for in Section 3 of the National Labor Relations Act. The defendants Boyd S. Leedom, Phillip Ray Rodgers, John H. Fanning and Gerald A. Brown, and each of them, are members of said Board and as such exercise such duties and functions and administer said National Labor Relations Act as amended. And they, and each of them, are duly appointed and at all times hereinafter mentioned were acting as members of said Board as provided for in Section 3 of the National Labor Relations Act. They, and each of them as

members of said Board, maintain offices at 1717 Pennsylvania Avenue, N.W., Washington, D.C., and were within the jurisdiction of this Court.

Said defendants, and each of them, are sued individually and as members of the National Labor Relations Board.

4. On or about May 29, 1962, plaintiff Local 46 filed a petition for certification of representatives with the Regional Director of the National Labor Relations Board for the 12th Region alleging that a question concerning representation affecting commerce had arisen in respect of employees of the Miami Herald Publishing Company, publisher of a daily newspaper in the City of Miami, Florida, known as "The Miami Herald" in that a substantial number of employees of said company, along with the members of Local 46 who were then engaged in a strike against said company, desired to be represented for purposes of collective bargaining by plaintiff Local 46 pursuant to Section 9 of the Labor Management Relations Act. Such petition was docketed as Case No. 12-RC-1471 by the Regional Director of the National Labor Relations Board for the 12th Region.

5. Prior to the filing of said petition and docketing of same by the Regional Director as aforesaid, the Board had delegated to the Regional Director for the 12th Region pursuant to Section 3(b) of the National Labor Relations Act its powers under Section 9 of such Act, 29 U.S.C.A. §159, "to determine the unit appropriate for the purposes of collective bargaining; to investigate and provide for hearings and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of 29 U.S.C.A. §159 and certify the results thereof."

6. Following the filing and docketing of such petition, the Regional Director in due course directed a hearing thereon which was conducted in Miami, Florida by a Hearing Officer lawfully designated by the Regional Director for the

12th Region at which plaintiff and the Miami Herald Publishing Company appeared and participated, each being represented by counsel.

7. After the submission of briefs, the Regional Director for the 12th Region, acting for the defendant Board, issued a decision and direction of election directing that an election be had among the pressroom employees of the Miami Herald Publishing Company not more than thirty (30) days from the date of such decision and direction of election. Such decision and direction of election was entered on June 29, 1962. Thereafter, the Miami Herald Publishing Company filed with the defendant Board a request for a review of such decision and direction of election which the Board denied on July 20, 1962 by means of a telegraphic order in which the Board stated that such request for review raised "no substantial issue of fact or law warranting a review."

8. The Miami Herald Publishing Company brought an action in the United States District Court, Southern District of Florida, Tampa Division, seeking to restrain the Regional Director for the Board's 12th Region from conducting such election.

The District Court declined to restrain the election and on July 25, 1962 the Regional Director conducted such election in which the employees of the Miami Herald Publishing Company participated, along with the striking members of plaintiff Local 46 who were exercising in such election their right to vote conferred by an amendment to the National Labor Relations Act approved September 14, 1959, 73 Stat. 525, providing *inter alia*:

Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within 12 months after commencement of the strike.

The strike by plaintiff Local 46 had commenced on August 1, 1961.

9. After having telegraphically denied the Miami Herald Publishing Company's request for a review of the Regional Director's decision and direction of election, the defendants, on their own motion and without further proceedings, caused to be issued a telegraphic order dated July 20, 1962, granting the employer's request for review and "set aside the election."

Said conduct by the defendants as aforesaid was contrary to the express language of the statute and the delegation by the defendant Board of its powers to the Regional Director which provides that the granting of a review "shall not operate as a stay of any action taken by the Regional Director unless specifically ordered by the defendant Board." And no stay of the Regional Director's prior actions had been directed by the Board, and, in fact, the Board had previously denied the Miami Herald Publishing Company's request for a review.

Such action by the defendant Board was further violative of the Rules and Regulations of the National Labor Relations Board, Series 8, effective November 13, 1959 which provide for a review of a decision by the Regional Director and which state in part, Section 102.67(g), "the granting of a request for review shall not stay the Regional Director's decision unless otherwise ordered by the Board." In this case the Board did not otherwise so order. And further, "when review has been granted the Board will consider the entire record in the light of the grounds relied upon for review." Such record the Board did not then have before it. It purported in its telegraphic order to grant review "on its own motion" and at the same time therein purported to grant the Miami Herald Publishing Company the ultimate relief it sought, to-wit, the vacation of the election and disfranchisement of plaintiff's members of their right to vote secured and protected by 29 U.S.C.A. 159(c)(3). Such

precipitous action by the defendant Board without notice or opportunity to be heard was and is arbitrary, capricious, constituted an abuse of discretion and operated to deny plaintiff due process of law contrary to the Fifth Amendment to the United States Constitution.

10. In the wake of these developments the defendant Board on August 24, 1962, invited the parties, to-wit, plaintiff and the Miami Herald Publishing Company, to address briefs to the Board with respect to the question of the eligibility of striking employees "in the event that the Board, upon review, affirmed the Regional Director's action." Briefs were then filed by both plaintiff and the Miami Herald Publishing Company.

11. On the basis of the entire record then before it, the Board on November 8, 1962, entered its "decision and review in remand" in which it considered the employer's request for review, stating in such decision:

The Board is satisfied that the matters asserted in the Employer's (Miami Herald Publishing Company) request for review do not warrant reversal of the Regional Director's decision and direction of election which is hereby affirmed.

Notwithstanding the foregoing determination, the defendant Board further held, in passing, that since the ballots cast in the election were never counted and despite the fact that the decision and affirmance of the Regional Director indicated the plain impropriety and unlawful nature of the Board's telegraphic order of July 20, 1962 setting aside the election, the Board purported to remand the case to the Regional Director to "complete the proceedings" by conducting a "rerun election" under the original decision and direction of election of the Regional Director dated June 29, 1962, reserving the issue of the voting eligibility of plaintiff's members for determination subsequent to such election.

12. Plaintiffs allege that the decision on Review and Remand of the defendant Board was unlawful, arbitrary and capricious in the following respects:

(a) Section 9(c)(1) provides: "If the Board finds upon the record of such hearing that such a question of representation exists, *it shall direct* an election by secret ballot and **SHALL CERTIFY THE RESULTS THEREOF.**"

Contrary to the form of the statute in such cases, the Board declined to certify the results of the election had herein on July 25, 1962, all in violation of the strict mandate of such statute.

(b) At the time of the holding of the election herein on July 25, 1962, plaintiff's members were entitled without question to vote under color of Section 9(c)(3) of the Act which provides that employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote . . . in any election conducted within 12 months after the commencement of the strike. The strike herein was commenced August 1, 1961 and the one year period expired August 1, 1962.

By its decision on Review and Remand in which it directed a "rerun election" which would necessarily be held more than one year following the commencement of the strike, the consequence of the Board's decision is to disfranchise arbitrarily and capriciously plaintiff and plaintiff's members from exercising a right specifically secured to them by the Act, an unprecedented course of action which the defendant Board does not even attempt to justify.

13. Plaintiffs allege that they have no plain, speedy or adequate remedy at law and that they are entitled to maintain this suit to restrain illegal administrative action which, if not enjoined, will result in the obliteration of a right granted by Congress to plaintiff and its members.

14. Plaintiff alleges that as a labor union it has no other means of obtaining relief from the unlawful actions of the

defendant Board; that it has exhausted its remedies before the defendant Board; that it has been advised by the defendant Board that unless restrained it intends to effectuate its decision on Review and Remand dated November 8, 1962, and that, in fact, the rerun election contemplated by such decision has been scheduled for December 5, 1962, in which plaintiff's members would be required to risk unlawful and permanent disfranchisement, contrary to the express terms of the National Labor Relations Act as amended; and that the defendant Board has no intention of following the statute by counting the ballots already casts in a concededly valid election and certifying the results thereof as the defendant Board is lawfully bound to do.

15. Plaintiff alleges on information and belief that the defendant Board has expressed an intention, upon securing physical possession of the ballots now impounded under an order of the United States District Court for the Southern District of Florida, to destroy such ballots, thereby pretermitted the instant suit, all to the great, immediate and irreparable injury of plaintiff.

WHEREFORE, plaintiff prays that this Court issue a temporary injunction enjoining and restraining the defendants, their agents, attorneys and employees, including but not limiting to Harold A. Boire, Regional Director for the 12th Region, 112 East Cass Street, Tampa, Florida, from conducting a rerun election in Case No. 12-RC-1471 now scheduled for December 5, 1962; that after a full hearing such temporary injunction be made permanent and perpetual; that the Court enter an order directing defendant Board to direct its Regional Director for the 12th Region to open and count the ballots cast in the election had pursuant to the Regional Director's decision and direction of election on July 25, 1962 and to certify the results thereof as required by law; that in aid of the foregoing relief that the Court enjoin and restrain the defendant, its agent, attorneys and employees from destroying or attempting to

destroy said ballots pending a final determination of this suit; and that the Court award plaintiff a declaratory judgment adjudging and decreeing that the defendant Board's refusal to count the ballots cast in the July 25, 1962 election and to certify the results thereof was and is a violation of Section 9(c)(1) of the National Labor Relations Act as amended and was and is a violation of plaintiff's members' rights secured under Section 9(c)(3) of such Act as amended, and that the decision on Review and Remand issued by the defendant Board represented an unlawful exercise by the Board of a power withdrawn from the Board by Sections 3(b) and 9 of the National Labor Relations Act as amended, and plaintiff prays for such other and further relief as to the Court may seem just and proper.

McCLELLAN AND WRIGHT

by /s/ JOHN S. McLELLAN

John S. McLellan
421 East Market Street
Kingsport, Tennessee

BUTLEDGE AND MILLEDGE

By /s/ NEAL RUTLEDGE

Neal Rutledge
6th Floor, Flagler Federal Bldg.
111 N.E. First Street
Miami 32, Florida

By /s/ HERBERT S. THATCHER

Herbert S. Thatcher
1009 Tower Building
Fourteenth & K Streets, N.W.
Washington 5, D.C.

By _____

Dave Barr
1009 Tower Building
Fourteenth & K Streets, N.W.
Washington 5, D.C.

Attorneys for Plaintiff, Miami
Newspaper Printing Pressmen's
Union Local No. 46.

STATE OF TENNESSEE:

COUNTY OF SULLIVAN:

JOHN S. McLELLAN and NEAL RUTLEDGE say that they are counsel for the plaintiff; that they are authorized to make this affidavit on behalf of plaintiff; that the foregoing complaint is true of their own knowledge, except as to those matters stated therein on information and belief, and as to those matters they believe them to be true.

/s/ JOHN S. McLELLAN

John S. McLellan

/s/ NEAL RUTLEDGE

Neal Rutledge

Sworn to and subscribed before me this 29th day of November, 1962.

/s/ DONALD E. WRIGHT

Notary Public

My commission expires:
April 29, 1964

(Filed November 29, 1962)

MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs by their attorneys respectfully represent:

1. That they have heretofore filed their verified complaint asking for a preliminary and final injunction alleging that the defendants individually and as Chairman and members of the National Labor Relations Board have unlawfully denied plaintiffs' rights secured and protected by the National Labor Relations Act as amended in certain proceedings appearing upon the records of the Board as "In the Matter of Miami Herald Publishing Company, Employer, and Local 46, Miami Newspaper Printing Pressmen's Union Local 46, AFL-CIO, Petitioner, Case No. 17-RC-1471," in which the said Board entered a decision on remand on November 8, 1962.
2. That the complaint and the affidavit submitted in support thereof set forth that the plaintiff will suffer irreparable injury, loss or damage before notice can be served upon defendants and a hearing had thereon.

WHEREFORE, plaintiff moves that a temporary restraining order be issued in accordance with the prayer of the complaint restraining defendant from conducting the rerun election ordered in Case No. 12-RC-1471 and enjoin the defendants from destroying the ballots cast in the election had on July 25, 1962, and that the Court enter such further orders as equity may deem meet.

/s/ JOHN S. McLELLAN

John S. McLellan
421 East Market Street
Kingsport, Tennessee

/s/ NEAL RUTLEDGE

Neal Rutledge
6th Floor, Flagler Federal Bldg.
111 N.E. First Street
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Herbert S. Thatcher
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Fourteenth & K Streets, N.W.
Washington 5, D. C.

Dave Barr
1009 Tower Building
Fourteenth & K Streets, N.W.
Washington 5, D. C.
Attorneys for Plaintiff

(Filed November 29, 1962)

AFFIDAVIT OF JOHN S. MCLELLAN

STATE OF TENNESSEE:
COUNTY OF SULLIVAN:

JOHN S. MCLELLAN, being first duly sworn, deposes and states as follows:

- (1) That he is a member of the Bar of the Supreme Court of Tennessee and General Counsel for International Printing Pressmen and Assistants' Union of North America with which plaintiff Local 46 is affiliated.
- (2) That he has personal knowledge of the facts described in the complaint herein.
- (3) Plaintiff, Local 46, Miami Newspaper Printing Pressmen's Union, is an unincorporated association organized as a local labor organization within the meaning and definition of the Labor Management Relations Act, 1947, 61 Stat. 136, maintaining its principal situs in Miami, Florida, and being composed of some 350 newspaper printing pressmen employed by the newspaper publishing industry in and around Miami, Florida. Said Local 46 is affiliated with the International Printing Pressmen and Assistants' Union of North America, an International labor union organized in 1869 for the purpose of representing employees in the printing industry in collective bargaining with various employers. Membership in Local 46 is open to all newspaper printing pressmen and apprentices and said Local 46 exists for the purpose of representing such categories of employees in collective bargaining with newspaper publishers in the Miami, Florida area.
- (4) On or about May 29, 1962, plaintiff Local 46 filed a petition for certification of representatives with the Regional Director of the National Labor Relations Board for the 12th Region alleging that a question concerning

representation affecting commerce had arisen in respect of employees of the Miami Herald Publishing Company, publisher of a daily newspaper in the City of Miami, Florida known as "The Miami Herald" in that a substantial number of employees of said company, along with the members of Local 46 who were then engaged in a strike against said company, desired to be represented for purposes of collective bargaining by plaintiff Local 46 pursuant to Section 9 of the Labor Management Relations Act. Such petition was docketed as Case No. 12-RC-1471 by the Regional Director of the National Labor Relations Board for the 12th Region.

(5) Prior to the filing of said petition and docketing of same by the Regional Director as aforesaid, the Board had delegated to the Regional Director for the 12th Region pursuant to Section 3(b) of the National Labor Relations Act its powers under Section 9 of such Act, 29 U.S.C.A. §159, "to determine the unit appropriate for the purposes of collective bargaining; to investigate and provide for hearings and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of 29 U.S.C.A. §159 and certify the results thereof."

(6) Following the filing and docketing of such petition, the Regional Director in due course directed a hearing thereon which was conducted in Miami, Florida by a Hearing Officer lawfully designated by the Regional Director for the 12th Region at which plaintiff and the Miami Herald Publishing Company appeared and participated, each being represented by counsel.

(7) After the submission of briefs, the Regional Director for the 12th Region, acting for the defendant Board, issued a decision and direction of election directing that an election be had among the pressroom employees of The Miami Herald Publishing Company not more than thirty (30) days from the date of such decision and direction of elec-

tion. Such decision and direction of election was entered on June 29, 1962. Thereafter, the Miami Herald Publishing Company filed with the defendant Board a request for a review of such decision and direction of election which the Board denied on July 20, 1962 by means of a telegraphic order in which the Board stated that such request for review raised "no substantial issue of fact or law warranting a review."

(8) The Miami Herald Publishing Company brought an action in the United States District Court, Southern District of Florida, Tampa Division, seeking to restrain the Regional Director for the Board's 12th Region from conducting such election.

The District Court declined to restrain the election and on July 25, 1962 the Regional Director conducted such election in which the employees of the Miami Herald Publishing Company participated, along with the striking members of plaintiff Local 46 who were exercising in such election their right to vote conferred by an amendment to the National Labor Relations Act approved September 14, 1959, 73 Stat. 525, providing *inter alia*:

"Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within 12 months after commencement of the strike."

The strike by plaintiff Local 46 had commenced on August 1, 1961.

(9) After having telegraphically denied the Miami Herald Publishing Company's request for a review of the Regional Director's decision and direction of election, the defendants, on their own motion and without further proceedings, caused to be issued a telegraphic order dated July 20, 1962, granting the employer's request for review and "set aside the election."

Said conduct by the defendants as aforesaid was contrary to the express language of the statute and the delegation by the defendant Board of its powers to the Regional Director which provides that the granting of a review "shall not operate as a stay of any action taken by the Regional Director unless specifically ordered by the defendant Board." And no stay of the Regional Director's prior actions had been directed by the Board, and, in fact, the Board had previously denied the Miami Herald Publishing Company's request for a review.

Such action by the defendant Board was further violative of the Rules and Regulations of the National Labor Relations Board, Series 8, effective November 13, 1959 which provide for a review of a decision by the Regional Director and which state in part, Section 102.67(g), "the granting of a request for review shall not stay the Regional Director's decision unless otherwise ordered by the Board." In this case the Board did not otherwise so order. And further, "When review has been granted the Board will consider the entire record in the light of the grounds relied upon for review." Such record the Board did not then have before it. It purported in its telegraphic order to grant review "on its own motion" and at the same time therein purported to grant the Miami Herald Publishing Company the ultimate relief it sought, to-wit, the vacation of the election and disfranchisement of plaintiff's members of their right to vote secured and protected by 29 U.S.C.A. 159(c)(3). Such precipitous action by the defendant Board without notice or opportunity to be heard was and is arbitrary, capricious, constituted an abuse of discretion and operated to deny plaintiff due process of law contrary to the Fifth Amendment to the United States Constitution.

(10) In the wake of these developments, the defendant Board on August 24, 1962, invited the parties, to-wit, plaintiff and the Miami Herald Publishing Company, to address

briefs to the Board with respect to the question of the eligibility of striking employees "in the event that the Board, upon review, affirmed the Regional Director's action." Briefs were then filed by both plaintiff and the Miami Herald Publishing Company.

(11) On the basis of the entire record then before it the Board on November 8, 1962 entered its "decision and review on remand" in which it considered the employer's request for review, stating in such decision, "The Board is satisfied that the matters asserted in the Employer's (Miami Herald Publishing Company) request for review do not warrant reversal of the Regional Director's decision and direction of election which is hereby affirmed."

Notwithstanding the foregoing determination, the defendant Board further held, in passing, that since the ballots cast in the election were never counted and despite the fact that the decision and affirmance of the Regional Director indicated the plain impropriety and unlawful nature of the Board's telegraphic order of July 20, 1962 setting aside the election, the Board purported to remand the case to the Regional Director to "complete the proceedings" by conducting a "rerun election" under the original decision and direction of election of the Regional Director dated June 29, 1962, reserving the issue of the voting eligibility of plaintiff's members for determination subsequent to such election.

(12) Plaintiffs allege that the decision on Review and Remand of the defendant Board was unlawful, arbitrary and capricious in the following respects:

(a) Section 9(c)(1) provides: "If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and SHALL CERTIFY THE RESULTS THEREOF."

Contrary to the form of the statute in such cases, the Board declined to certify the results of the election had

herein on July 25, 1962, all in violation of the strict mandate of such statute.

(b) At the time of the holding of the election herein on July 25, 1962, plaintiff's members were entitled without question to vote under color of Section 9(c)(3) of the Act which provides that employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote—in any election conducted within 12 months after the commencement of the strike. The strike herein was commenced August 1, 1961 and the one year period expired August 1, 1962.

By its decision on Review and Remand in which it directed a "rerun election" which would necessarily be held more than one year following the commencement of the strike, the consequence of the Board's decision is to disfranchise arbitrarily and capriciously plaintiff and plaintiff's members from exercising a right specifically secured to them by the Act, an unprecedented course of action which the defendant Board does not even attempt to justify.

(13) Plaintiffs allege that they have no plain, speedy or adequate remedy at law and that they are entitled to maintain this suit to restrain illegal administrative action which, if not enjoined, will result in the obliteration of a right granted by Congress to plaintiff and its members.

(14) Plaintiff alleges that as a labor union it has no other means of obtaining relief from the unlawful actions of the defendant Board; that it has exhausted its remedies before the defendant Board; that it has been advised by the defendant Board that unless restrained it intends to effectuate its decision on Review and Remand dated November 8, 1962, and that, in fact, the rerun election contemplated by such decision has been scheduled for December 5, 1962 in which plaintiff's members would be required to risk unlawful and permanent disfranchisement, contrary to the express terms of the National Labor Relations Act

as amended; and that the defendant Board has no intention of following the statute by counting the ballots already cast in a concededly valid election and certifying the results thereof as the defendant Board is lawfully bound to do.

(15) Plaintiff alleges on information and belief that the defendant Board has expressed an intention, upon securing physical possession of the ballots now impounded under an order of the United States District Court for the Southern District of Florida, to destroy such ballots, thereby pre-terminating the instant suit, all to the great immediate and irreparable injury of plaintiff.

/s/ JOHN S. McLELLAN
John S. McLellan

Sworn to and subscribed before me this 29th day of November, 1962.

/s/ DONALD E. WRIGHT
Notary Public

My commission expires:
April 29, 1964

(Filed November 30, 1962)

MEMORANDUM & ORDER

This matter comes before the Court on the complaint for interlocutory and permanent injunction, declaratory judgment and incidental relief. The action was filed in the United States District Court for the District of Columbia on November 29, 1962, at approximately 3:45 P.M. The defendant appeared on telephone notice.

The Court heard argument on the motion for a temporary restraining order, wherein the plaintiff requests the Court to restrain defendants from destroying the ballots cast in an election held on July 25, 1962, and now impounded under order of the United States District Court of Southern District of Florida, Tampa Division; plaintiff also requests this Court to enjoin the defendants from conducting a "rerun" election now scheduled for December 5, 1962.

The Court has read the complaint, supporting affidavit, etc., and has reviewed the order of dismissal of the action in *Miami Herald Publishing Co. v. Harold A. Boire*, No. 4558-Civ.-T in the Florida Court, and the Memorandum Opinion attached thereto. The Court having heard oral arguments by counsel for the defendants, the Court finds from the pleadings, argument, etc., that the Temporary Restraining Order now pending before this Court should be denied, as the Court finds that the exigencies of the situation do not call upon the Court to exercise the extraordinary legal procedure of a temporary restraining order.

Accordingly, the motion for a temporary restraining order is denied, this 30th day of November, 1962.

The defendants, having been served, will file responsive pleadings in answer to the complaint.

/s/ LEONARD P. WALSH

LEONARD P. WALSH, Judge

November 30, 1962

(Filed December 3, 1962)

ORDER

This cause came on to be heard on Plaintiff's application for a Temporary Restraining Order. The Court having heard oral argument of counsel in open Court and having considered Plaintiff's pleadings, arguments, etc.,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the motion for a Temporary Restraining Order be and it is hereby denied.

/s/ LEONARD P. WALSH
LEONARD P. WALSH, Judge

December 3, 1962.

EXHIBIT A

Miami, Florida

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE MIAMI HERALD PUBLISHING CO.,
Employer,
and
LOCAL NO. 46, MIAMI NEWSPAPER
PRINTING PRESSMEN'S UNION, AFL-CIO
Petitioner. } Case No.
 } 12-RC-1471

DECISION ON REVIEW AND REMAND

On June 29, 1962, the Regional Director for the Twelfth Region issued a Decision and Direction of Election in the above-entitled proceeding. Thereafter, the Employer, in accordance with Section 102.67 of the Board's Rules and Regulations, as amended, filed with the Board a timely request for review of such Decision and Direction of Election. The Board, by telegraphic order of July 20, 1962, denied the request for review. On July 24, 1962, the Employer instituted an action in the United States District Court, Southern District of Florida, Tampa Division,¹ seeking to enjoin the Regional Director from conducting an election pursuant to his Decision and Direction of June 29, 1962. On July 25, 1962, the Regional Director conducted the election and pursuant to the direction of the Court, all the ballots cast were thereupon impounded. The Board on its own motion issued an Order, dated August 22, 1962, in which it vacated the telegraphic order of July 20, 1962, granted the Employer's request for review, and set aside the election. Subsequently the Board, by telegram dated

¹ *The Miami Herald Publishing Co., v. Boire, et al. No. 4458-Civ-8.*

August 24, 1962, requested the parties to address their briefs to, among other things, the question of the eligibility of striking employees, in the event that the Board, upon review, affirmed the Regional Director's action. Thereafter, briefs were filed by both the Employer and the Petitioner.

On the basis of the entire record, and after careful consideration, the Board is satisfied that the Matters asserted in the Employer's request for review do not warrant reversal of the Regional Director's Decision and Direction of Election which is hereby affirmed.

The Employer's principal attack in this proceeding involves the 1959 amendment to Section 9(e)(3) of the Act which provides that replaced economic strikers may vote in representation elections "under such regulations as the Board shall find are consistent with the purposes and provisions of the Act . . ." It contends that as a matter of law this amendment requires the Board to promulgate formal regulations under the Administrative Procedure Act, contrary to the Board's existing practice of resolving such eligibility issues through the adjudicative process. However, in our opinion the Employer's contention lacks statutory and legislative history support.² There is no affirmative mandate in the statute requiring that the Board implement the required regulations *only* by its formal rule making power. We believe, contrary to the Employer, that the burden of the amendment is to require the Board to

² We find no merit in the Employer's contention that the showing of interest by replaced economic strikers is insufficient to satisfy our administrative requirement for processing the instant petition. We also find lacking in merit the further contention that by reason of its constitutional provisions and alleged antagonism against the replacement employees, the Petitioner is incapable of representing all employees in the unit. However, if the Petitioner is certified and fails to represent all employees in the unit, its certification would be subject to revocation. See *Standard Cigar Company*, 117 NLRB 852, 856, (fn. 13); and *Moyfair Industries Inc.*, 126 NLRB 223.

regulate substantively the eligibility of replaced economic strikers, leaving the procedural means for such regulation to the informed discretion of the Board. Because of the complexity of the problem and the innumerable factual variations involving the eligibility of replaced economic strikers, the Board has heretofore decided as a matter of policy to rule on such issues in its decisional process.³ In our opinion, the Employer has advanced no compelling reasons for changing existing policy.

Since the ballots cast in the July 25 election were never counted and the election itself was vacated, under circumstances set forth above, we shall remand the case to the Regional Director to complete the proceedings by conducting a rerun election under his Decision and Direction of Election of June 29, 1962, as modified hereinafter. In order not to disenfranchise employees hired since the original election, the eligibility period for the rerun shall be the payroll period immediately preceding the date of this Decision. We shall not now address ourselves to the issue of the voting eligibility of replaced economic strikers in this rerun election. Instead, we shall utilize the challenge procedure;⁴ and should the votes of these economic strikers be sufficient in number to affect the results of the election, we shall then decide the question of their eligibility in the light of the "12 months" provision. The Regional Director is therefore directed to challenge the ballots of all economic strikers who have been on strike more than 12 months who may attempt to vote in the rerun election.

Accordingly the case is hereby remanded to the Regional Director for the Twelfth Region for the purpose of holding a rerun election consistent with this decision.

³ *W. Wilton Wood, Inc.*, 127 NLRB 1675; *Tampa Sand and Material Co.*, 129 NLRB 1273.

⁴ *The Hertner Electric Co.*, 115 NLRB 820.

Dated, Washington, D.C.
November 8, 1962

Frank W. McCulloch, Chairman

Philip Ray Rodgers, Member

Boyd Leedom, Member

John H. Fanning, Member

Gerald A. Brown, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

EXHIBIT B**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

THE MIAMI HERALD PUBLISHING CO.
Employer,
and
LOCAL NO. 46, MIAMI NEWSPAPER
PRINTING PRESSMEN'S UNION, AFL-CIO
Petitioner.

} Case No.
12-RC-1471

ORDER

On June 29, 1962, the Regional Director for the Twelfth Region issued a Decision and Direction of Election in the above-entitled proceeding. Thereafter, the Employer filed a timely request for review of such Decision and Direction of Election. On July 20, 1962, the Board by telegraphic order denied the request for review. Subsequent thereto, on July 24, 1962, the Employer instituted an action in the U.S. District Court, Southern District of Florida, Tampa Division, seeking to enjoin the Regional Director from conducting an election pursuant to his Decision and Direction of Election.¹ On July 25, 1962, the Regional Director con-

We have decided, upon our own motion, to reconsider our order denying the Employer's request for review hereinbefore filed.

Accordingly, it is ordered that our order issued July 20, 1962, denying the Employer's request for review of the Regional Director's Decision and Direction of Election be, and it hereby is, vacated. It is further ordered that such conducted the election and impounded all the ballots cast therein.

¹ *The Miami Herald Publishing Co. v. Boyer et al.*, No. 4458-Civ-T.

request for review be, and it hereby is, granted. In the circumstances, it is ordered that the election held pursuant to the Regional Director's Decision and Direction of Election be, and it hereby is, set aside.

Dated, Washington, D.C. August 22, 1962

Frank W. McCulloch, Chairman

Philip Ray Rodgers, Member

Boyd Leedom, Member

John H. Fanning, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
TAMPA DIVISION

THE MIAMI HERALD PUBLISHING
COMPANY,

Plaintiff,

vs.

HAROLD A. BOIRE, REGIONAL DIRECTOR,
TWELFTH REGION, NATIONAL LABOR RE-
LATIONS BOARD,

Defendant.

} Case No.
4458-Civ.-T.

MEMORANDUM OPINION

In this case the Plaintiff, The Miami Herald Publishing Company, filed its Complaint against Harold A. Boire, as Regional Director, Twelfth Region, National Labor Relations Board, seeking to enjoin a representation election by certain employees of the Plaintiff. The Complaint alleged that the Defendant acted in willful violation of the provisions of the National Labor Relations Act by providing in its Decision and Direction of Election and Notice of Election that employees of the Plaintiff engaged in an economic strike which commenced not more than twelve months prior to the day of election would be eligible to vote without the Board having previously promulgated relevant regulations as contemplated by Title 29, United States Code, Section 159(c)(3), which provides:

"(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election."

Plaintiff also complained that when it sought review by the National Labor Relations Board of the Regional Director's Decision and Direction of Election, the Board denied Plaintiff's request for review and that such denial was not valid because it was made by only one member of the Board instead of at least three members, as required by Title 29, United States Code, Section 153(b).

The Complaint was filed in this case on July 24, 1962, and came on for hearing before this Court at eleven o'clock A.M., July 25, 1962; the election, which was and is the subject of the controversy herein, was scheduled for 3:00 o'clock P.M. that day, July 25. This Court ordered that the election proceed as scheduled but impounded the ballots pending final determination of this action. By its Order of August 6, 1962, this Court determined that, based on the allegations of the Complaint, it had jurisdiction of the subject matter under Title 28, United States Code, Section 1337.

Prior to a hearing on the merits, the following Order was issued on August 22, 1962, by the National Labor Relations Board in Case No. 12-RC-1471, being the case before that Board wherein The Miami Herald Publishing Company had

sought a review of the Decision and Direction of Election of the Regional Director:

**"UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

THE MIAMI HERALD PUBLISHING CO. <i>Employer</i> and LOCAL NO. 46, MIAMI NEWSPAPER PRINTING PRESSMEN'S UNION, AFL-CIO <i>Petitioner</i>	Case No. 12-RC-1471
--	-------------------------------

ORDER

On June 29, 1962, the Regional Director for the Twelfth Region issued a Decision and Direction of Election in the above-entitled proceeding. Thereafter, the Employer filed a timely request for review of such Decision and Direction of Election. On July 20, 1962, the Board by telegraphic order denied the request for review. Subsequent thereto, on July 24, 1962, the Employer instituted an action in the U.S. District Court, Southern District of Florida, Tampa Division, seeking to enjoin the Regional Director from conducting an election pursuant to his Decision and Direction of Election.¹ On July 25, 1962, the Regional Director conducted the election and impounded all the ballots cast therein.

We have decided, upon our own motion, to reconsider our order denying the Employer's request for review hereinbefore filed.

Accordingly, it is ordered that our order issued July 20, 1962, denying the Employer's request for review of the Regional Director's Decision and Direction of Election be,

¹ *The Miami Herald Publishing Co. v. Boyer et al*, No. 4458-Civ.-T.

and it hereby is, vacated. It is further ordered that such request for review be, and it hereby is, granted. In the circumstances, it is ordered that the election held pursuant to the Regional Director's Decision and Direction of Election be, and it hereby is, set aside.

Dated, Washington, D.C. AUG 22 1962

Frank W. McCulloch Chairman

Philip Ray Rodgers Member

Boyd Leedom, Member

John H. Fanning, Member

(SEAL)

NATIONAL LABOR RELATIONS
BOARD

On August 24, 1962, the Defendant filed a Motion to postpone the hearing on the merits of Plaintiff's Complaint citing as grounds therefor the above-quoted August 22 Order of the Board. A hearing on said Motion was held at which time it developed that the position of the Plaintiff was that the Board's Order of August 22, 1962, was invalid and without force and effect because the Board had lost jurisdiction of the matter; and that, therefore, this case should proceed as though the Board had never issued its Order of August 22. Defendant's position was that the Board's Order of August 22 granted Plaintiff the relief sought in this controversy, so that there remains no controversy before this Court and this action should be dismissed. Local No. 46, Miami Newspaper Printing Pressmen's Union, AFL-CIO, although denied leave to intervene in this cause, was granted the right to attend and participate at all hearings and to file briefs as amicus curiae; the

Union, through its counsel, took the same position as the Plaintiff concerning the alleged invalidity of the Board's Order of August 22, 1962.

This Court took under advisement the questions raised at said hearing and has considered briefs from the Plaintiff, the Defendant and Local No. 46, as amicus curiae. After full deliberation, this Court is of the opinion that the Defendant's position is correct and that the Board's Order of August 22, 1962, renders this case, at this time, moot. It seems contradictory that Plaintiff should contend, on the one hand, that the Board's denial of its petition for review was illegal and ask this Court to so find, and yet, on the other hand, argue that the Board, acting through four members, could not reconsider the very action which Plaintiff contends was invalid.

Since the Board has, for reasons of its own, set aside the election and will reconsider the prior Order denying the review, it is unnecessary for this Court to pursue further the question as to whether or not it should set aside the Board's first Order denying Plaintiff's request for review. As for the Decision and Direction of Election being invalid as not complying with the requirements of the National Labor Relations Act, as above stated, since this matter is now returned to the Board, the Plaintiff has not yet exhausted its administrative remedies on this subject so that this Court cannot at this time properly assume jurisdiction of the matter.

WHEREFORE, this Court finds:

1. That the Complaint as amended should be dismissed without prejudice, and
2. That the impounded ballots now held in the custody of the Clerk of this Court, Miami Division, in the Federal Building, Miami, Florida, should be delivered to the Defendant seventy (70) days after the entry of Final Judg-

ment herein, unless within said time a notice of appeal has been filed in this cause; if such notice of appeal is filed, then the Clerk shall continue to hold said ballots until final determination of the appeal. If this Court is affirmed, the ballots shall be delivered to the Defendant within fifteen (15) days after such affirmance.

DONE at Tampa, Florida, this 28th day of September,
1962.

/s/ George C. Young

UNITED STATES DISTRICT
JUDGE

EXHIBIT D**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
TAMPA DIVISION**

THE MIAMI HERALD PUBLISHING COMPANY,

Plaintiff,

vs.

HAROLD A. BOIRE, REGIONAL DIRECTOR,
TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD,

Defendant.)

No. 4458-Civ.-T

ORDER OF DISMISSAL

The Court having this day rendered a Memorandum Opinion in this cause wherein the Court found that the Complaint, as amended, should be dismissed without prejudice, and the Court being fully advised in the premises, it is, upon consideration;

ORDERED AND ADJUDGED:

1. That the Complaint, as amended, be and is hereby dismissed without prejudice;
2. That the impounded ballots now held in the custody of the Clerk of this Court, Miami Division, in the Federal Building, Miami, Florida, be delivered to the Defendant seventy (70) days after the entry of this Order of Dismissal, unless within said time a Notice of Appeal has been filed in this cause; if such Notice of Appeal is filed then the Clerk shall continue to hold said ballots until final determination of the appeal. If this Court is affirmed the ballots shall be delivered to the Defendant within fifteen (15) days after such affirmance. The Clerk of this Court is hereby

ordered to comply with the directions hereinabove set forth concerning the custody and delivery of said ballots.

DONE AND ORDERED in Chambers at Tampa,
Florida, this 28th day of September, 1962.

/s/ GEORGE C. YOUNG

**UNITED STATES DISTRICT
JUDGE**

(Filed November 30, 1962)

**MOTION OF DEFENDANTS, CHAIRMAN AND
MEMBERS OF THE NATIONAL LABOR RELATIONS
BOARD TO DISMISS THE COMPLAINT, OR,
IN THE ALTERNATIVE, FOR SUMMARY
JUDGMENT IN THEIR FAVOR**

1. Defendants move that the complaint herein be dismissed on the grounds that:

- (a) This Court lacks jurisdiction over the subject matter of the action;
- (b) The complaint does not state a claim warranting relief;
- (c) The suit is premature.

2. In the alternative, defendants move that summary judgment for defendants be granted.

WHEREFORE, defendants respectfully request that the complaint be dismissed or that summary judgment be entered for defendants.

Dated at Washington, D.C.,
this 30th day of November, 1962.

/s/ MARCEL MALLET-PREVOST

Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS
BOARD
1717 Pennsylvania Avenue, N.W.
Washington 25, D.C.

**TRANSCRIPT OF PROCEEDINGS BEFORE
JUDGE LEONARD P. WALSH
ON DECEMBER 3, 1962**

(p. 63, line 14 to p. 64, line 12)

MR. McLELLAN: Yes, sir. The real thing is an administrative practice that these defendants adopted, which certainly we had nothing to do with, about the manner in which they would review these hundreds of requests for review, of regional director's decisions.

Instead of assigning those to a panel of three members or to a panel of the whole board the five members, they decided it would be on their own hook, with no help from us, they decided it would be a better practice and more sensible practice if they would assign one member of the Board for each month to handle all of these appeals since it is like a number of petitions for certiorari, there is not much merit in the whole bunch of them.

So, they did it.

So, when the Herald Publishing Company, who was the Plaintiff in Florida, got hold of this, they filed this lawsuit against the Board and the Board was not anxious to litigate the validity of this practice. So, at that point, without any proceedings, they come through with this telegram in which they set aside this election hoping that that will moot the Florida action and get them off the hook there without any determination one way or the other, and they were right, it did.

(p. 76, lines 11 to 17)

MR. McLELLAN: * * * Now, with respect to this second election, after the 12-month period a good number of these employees have been forced to find employment at various places around the country that are not and cannot be there to vote in person in this election. So we say that they were there when the valid election was cast and they have a statutory right to have their ballots counted.

(Filed December 4, 1962)

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

This case came on to be heard on December 3, 1962, on plaintiff's motion for a preliminary injunction and on defendants' motion to dismiss the complaint, or, in the alternative, for summary judgment in their favor. The court, after hearing the argument of counsel, and having considered the pleadings and the memoranda which have been filed, and being fully advised in the premises hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff labor organization is an unincorporated association maintaining its principal situs in Miami, Florida, and being composed of some 350 newspaper printing pressmen employed by the newspaper publishing industry in and around Miami, Florida.
2. Defendants are members of the National Labor Relations Board, which has its principal office in the District of Columbia.
3. On June 29, 1962, the Regional Director for the Twelfth Region, National Labor Relations Board, issued a Decision and Direction of Election in Board Case No. 12-RC-1471, entitled the Miami Herald Publishing Co. and Local No. 46, Miami Newspaper Printing Pressmen's Union, AFL-CIO, in which, pursuant to plaintiff union's petition, he directed that a representation election be held among the pressroom employees of the Miami Herald Publishing Company. That election was subsequently scheduled for July 25, 1962.
4. Thereafter, the Miami Herald Publishing Company (hereinafter "The Company"), in accordance with Section

102.67 of the Board's Rules and Regulations, as amended, filed with the Board a timely request for review of the Regional Director's Decision and Direction of Election. The Board, by telegraphic order of July 20, 1962, denied the request for review.

5. On July 24, 1962, the day before the scheduled election, the Company instituted an action in the United States District Court, Southern District of Florida, Tampa Division, seeking to enjoin the Regional Director from conducting that election. In its complaint, the Company alleged, *inter alia*, that the Board's denial of its request for review of the Regional Director's Decision and Direction of Election had been invalid, in that it was ruled upon by one member of the Board instead of by at least three members, as required by Section 3(b) of the National Labor Relations Act. The court (Young, J.) permitted the election to proceed as scheduled, but ordered the ballots impounded, pending final determination of the proceedings before him. On August 6, 1962, the court ruled that it had jurisdiction of the Company's suit and scheduled a hearing on the merits of the complaint.

6. Prior to the hearing on the merits, the Board issued an order, dated August 22, 1962, in which it vacated its prior order of July 20, 1962, denying the Company's request for review of the Regional Director's Decision and Direction of Election, granted that request for review, and set aside the election conducted on July 25, 1962. Thereafter, the Florida District Court, on motion of the defendant Regional Director, dismissed the Company's suit as moot on the grounds that the Board's order of August 22, 1962, setting aside the election of July 25, 1962, had granted the Company the relief it sought. The Court took this action over the objections of both the Company and plaintiff Union who urged that the Board's order of August 22, 1962, was invalid and without force or effect. Plaintiff here, though not a party to the Florida litigation, was

granted the right to, and did, attend and participate at hearings held on August 14th and August 31st and filed briefs as *amicus curiae*.

7. On August 24, 1962, the Board, by telegram, requested briefs from the Company and plaintiff union on the questions involved in the Board's review of the Regional Director's Decision and Direction of Election. Both filed briefs and, on November 8, 1962, the Board issued a Decision on Review and Remand, affirming the Regional Director's Decision and Direction of Election and directing the Regional Director to conduct a rerun election pursuant to his Decision and Direction of Election of June 29, 1962. The Board's Decision on November 8, 1962, reserved the question of the voting eligibility under Section 9(c)(3) of the Act of replaced economic strikers who had been on strike for longer than twelve months, stating that it would determine that question "should the votes of the economic strikers be sufficient in number to affect the results of the election . . ." Accordingly, the Board directed the Regional Director to challenge the ballots of all such strikers. Subsequently, the Regional Director scheduled the rerun election for December 5, 1962, and this suit followed.

CONCLUSIONS OF LAW

1. This court lacks jurisdiction of the subject matter of this action because plaintiff has failed to establish that the representation determinations complained of violated either a mandatory provision of the National Labor Relations Act or constitute a deprivation of due process under the Constitution of the United States. On the contrary the Court finds that defendants' actions complained of constitute merely an exercise of their broad discretionary authority under the Act and are, therefore, not subject to District Court review.

2. The court further finds that plaintiff's action is at this time premature.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, AD-JUDGED AND DECREED that:

Plaintiff's motion for a preliminary injunction shall be, and it is hereby denied.

Defendant's motion to dismiss the complaint shall be, and it is hereby granted.

Dated at Washington, D.C.
this 4th day of December, 1962

/s/ LEONARD P. WALSH

LEONARD P. WALSH, Judge

(Filed December 5, 1962)

NOTICE OF APPEAL

Notice is hereby given this 5th day of December, 1962, that the plaintiff, Miami Newspaper Printing Pressmen's Union, Local 46, hereby appeals to the United States Court of Appeals for the District of Columbia from the Judgment and Order of the United States District Court for the District of Columbia entered on the 4th day of December, 1962, in favor of the defendants and against said plaintiff which said Judgment and Order denied the plaintiff's motion for a preliminary injunction and granted the defendants' motion to dismiss the complaint.

Respectfully submitted,

John S. McLellan
421 E. Market St.
Kingsport, Tennessee

/s/ NEAL RUTLEDGE

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Attorneys for Plaintiff.

The Clerk will please direct copies of the herein notice to:

Marcel Mallet-Prevost, Esq.
Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Ave.
Washington 25, D.C.

**James C. Paras, Esq.,
National Labor Relations Board
1717 Pennsylvania Ave.
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**Stephen Goldberg, Esq.
National Labor Relations Board
1717 Pennsylvania Ave.
Washington 25, D.C.**

/s/ NEAL RUTLEDGE

NEAL RUTLEDGE

